

# ARTICLE

## LEGISLATIVE HISTORY IN THE MODERN CONGRESS

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### ABSTRACT

*A central debate in the field of legislation has asked: how reliable are the different types of legislative history? Yet there has been no understanding, throughout this debate, of who inside Congress drafts this legislative history. This is surprising, given the common intuition that authorship is a key indicator of reliability.*

*In response, this Article presents the results of an original empirical study—one that illuminates this unknown dimension of Congress, uncovering the actors and processes that produce modern legislative history. For this study, the author conducted interviews with congressional staffers drawn from both parties, both chambers of Congress, and numerous committees. Through the study, the Article discovers that different types of legislative history are drafted by very different actors within Congress—actors with fundamentally different competencies, motivations, and job descriptions.*

*Based on these findings, the Article urges statutory interpreters to adopt a new hierarchy of legislative history materials. Unlike the prevailing hierarchy, this new approach allows interpreters to prioritize legislative history drafted by those in Congress who possess the capacity, and the institutional motivation, to predictably generate reliable documents.*

*The interviews conducted for this Article also provided numerous additional discoveries about the inner workings of the modern Congress. The Article reports these discoveries, and it examines their implications for ongoing debates about democracy, legislative process, and statutory interpretation.*

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I. INTRODUCTION

Over the last forty years, Congress has undergone a fundamental transformation. Today, this legislative body no longer is a quaint institution populated only by legislators and a small cadre of assistants.<sup>1</sup> Instead, it has been remade into something much larger and more complex.<sup>2</sup> This new Congress

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<sup>1</sup> Congressional staffers did not even exist during the first six decades after the ratification of the Constitution. See HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, CONGRESSIONAL STAFFS 15 (1977). On the modest increases in staffing from the mid-nineteenth century through the mid-twentieth century, see *id.* at 20–43; GLADYS KAMMERER, THE STAFFING OF THE COMMITTEES OF CONGRESS 15–23 (1949).

<sup>2</sup> See, e.g., EDWARD M. KENNEDY, TRUE COMPASS 486 (2009) (describing the “shift of responsibility [from legislators to staffers] over the past forty or fifty years” as “enormous”);

employs thousands of committee staffers; it retains hundreds of experts in each of its nonpartisan congressional offices; and it permits each elected representative to retain formidable legislative and communications departments.<sup>3</sup> Moreover, it has established the many mechanisms of communication and accountability that are needed to make these thousands of individuals operate as a single, coherent institution. In short, Congress has been transformed into something that it did not resemble prior to the 1970s: a large, modern bureaucratic institution.<sup>4</sup>

As a result of this transformation, new divisions of labor prevail in the modern Congress. Over a series of articles, a number of scholars—myself included—have attempted to outline these new congressional divisions of labor and explain their significance for statutory interpretation.<sup>5</sup> This scholarly movement, which Amy Barrett has labeled “the process-based turn in

RONALD KESSLER, *INSIDE CONGRESS 80* (1998) (quoting Dan Quayle, describing the increase as “unbelievable”); Robert H. Salisbury & Kenneth A. Shepsle, *U.S. Congressman as Enterprise*, 6 *LEGIS. STUD. Q.* 559, 559 (1981) (describing the “tremendous growth in the last decade” of congressional staff).

<sup>3</sup> In 2016, Member offices employed 6,880 individuals, and committees employed 1,298 individuals. See *CONG. RESEARCH SERV.*, R43947, *HOUSE OF REPRESENTATIVES STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977-2016* 10 n.1 (2016), [https://www.everycrsreport.com/files/20160913\\_R43947\\_da2c748f8678c287d55f1dc7ef1c843c6f25a93f.pdf](https://www.everycrsreport.com/files/20160913_R43947_da2c748f8678c287d55f1dc7ef1c843c6f25a93f.pdf) [<https://perma.cc/Y63E-WM87>] [hereinafter *HOUSE STAFF*]; R. ERIC PETERSON & AMBER HOPE WILHELM, *CONG. RESEARCH SERV.*, R43496, *SENATE STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977-2016* 1 n.1 (2016), [https://www.everycrsreport.com/files/20160913\\_R43946\\_3db32886cf87195c80f3b0056a6b2c7a0e848f2d.pdf](https://www.everycrsreport.com/files/20160913_R43946_3db32886cf87195c80f3b0056a6b2c7a0e848f2d.pdf) [<https://perma.cc/8N8B-SCDT>] [hereinafter *SENATE STAFF*]. On nonpartisan offices, see Staff of J. Comm. on Printing, 112th Cong., 2011–2012; Official Cong. Directory, S. Pub. No. 112-12, at 394–93, 460–61 (2011) (showing that the number of attorneys in the Offices of the Legislative Counsel tripled between 1975 and 2011); *Organization and Staffing*, *CONG. BUDGET OFFICE*, <https://www.cbo.gov/about/organization-and-staffing> [<https://perma.cc/Q7TV-9RHD>] (showing that the Congressional Budget Office now employs about 250 policy experts and economists).

<sup>4</sup> On this transformation, see, for example, Salisbury & Shepsle, *supra* note 2, at 559 (arguing that Congress had changed to resemble, in its bureaucracy, a modern business enterprise).

<sup>5</sup> See Jesse M. Cross, *The Staffer’s Error Doctrine*, 56 *HARV. J. ON LEGIS.* 83 (2019); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 *HARV. L. REV.* 62, 90 (2015); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. REV.* 575 (2002); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 *COLUM. L. REV.* 807, 822 (2014); Ganesh Sitaraman, *The Origins of Legislation*, 91 *NOTRE DAME L. REV.* 79, 120–24 (2015); see generally ROBERT A. KATZMANN, *JUDGING STATUTES* (2014); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy* [forthcoming]; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons Part I*, 65 *STAN. L. REV.* 901 (2013) [hereinafter *Congressional Drafting Part I*]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons Part II*, 66 *STAN. L. REV.* 725 (2014) [hereinafter *Congressional Drafting Part II*]; Victoria F. Nourse, *A Decision Theory of Statutory Interpretation*, 122 *YALE L.J.* 70 (2012).

statutory interpretation,” has shed new light on the inner workings of this bureaucratic Congress.<sup>6</sup>

Until now, this “process-based turn” has focused primarily on a specific legislative product: statutory text. It has chronicled the actors, interactions, and processes that produce the text of federal statutes.<sup>7</sup> This focus on statutory drafting was a logical starting point for a “process-based turn” in legislation. Yet it leaves open a number of important questions about the production of legislative materials beyond statutory text. Most obviously, it leaves unexamined another legislative product that features centrally in statutory interpretation: the set of documents and statements that, collectively, courts cite as “legislative history.”<sup>8</sup>

The need for an updated, process-based understanding of legislative history is clear. Rather than investigating who actually drafts legislative history in the modern Congress, judges and scholars have attributed authorship to a vague category of actor that is labeled, generally, as the “staffer.”<sup>9</sup> Meanwhile, an entire debate has occurred over the reliability of different types of legislative history—and it has occurred without any awareness of the fact that, in the modern Congress, very different types of “staffer” are assigned drafting responsibility for different types of legislative history.<sup>10</sup> This would be akin to an investigator trying to determine what happened to a patient in a hospital and, when investigating the hospital records, never bothering to ascertain which documents were drafted by a cardiologist, which by a nurse, and which by a public relations official of the hospital. Authorship is central to any initial assumptions about reliability. In other words, it gives us clues about the capacity of the speaker to accurately explain something, as well as about the motivations animating the speaker. Yet there is no schol-

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<sup>6</sup> Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2193 (2017). For her part, Judge Barrett is skeptical of the interpretive utility of this process-based turn.

<sup>7</sup> See *supra* note 5.

<sup>8</sup> The term “legislative history” typically refers to a fixed universe of statements and documents generated during the legislative process in Congress, consisting of committee reports and of statements made in hearings, committee markups, and on the floor of each chamber. See WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* 981–1021 (4th ed. 2007) (citing these documents as providing the current universe of congressional legislative history). Some scholars, it is worth noting, have argued for expanding this universe of documents—for example, to include cost estimates generated by the Congressional Budget Office, Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism*, 84 U. CHI. L. REV. 177, 187–91 (2017), or presidential signing statements, Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239 (1995).

<sup>9</sup> See, e.g., *infra* notes 283–85.

<sup>10</sup> There has been a growing awareness of the differentiations that exist in nonpartisan congressional staff. See, e.g., *Congressional Drafting Part I*, *supra* note 5, at 968 (specifying the work of Legislative Counsel); Gluck, *supra* note 5, at 209 (specifying the work of the Congressional Budget Office); Shobe, *supra* note 5, at 822 (detailing the work of Legislative Counsel and the Congressional Research Service). There has not been a comparable appreciation of the differentiations that exist among partisan staff in Congress, however. For a full typology of staff in the modern Congress, see *infra* Figure 1.

arly or judicial understanding of who, exactly, drafts legislative history in the modern Congress.

This Article attempts to remedy this situation. It documents the divisions of labor that shape the drafting of legislative history in the modern Congress. In pursuit of this end, the author conducted in-depth interviews for this Article with thirty congressional staffers. Through these interviews, the author discovered that three different actors draft the bulk of legislative history. First, some legislative history is drafted by *committee legislative staff*.<sup>11</sup> Specifically, committee legislative staff takes sole drafting responsibility for committee reports, and it assumes primary responsibility for statements made by a Chair or Ranking Member of a committee or subcommittee, provided that the statement addresses a topic within the jurisdiction of the committee or subcommittee. Second, some legislative history is drafted by *Member legislative staff*—in particular, all other statements made at a committee hearing or markup. Third, legislative history also is drafted by *Member communications staff*, a staff that plays a particularly prominent role in the drafting of other floor statements.

These drafting assignments are notable because, as this Article chronicles, each staffer type carries with it a unique job description. At the most fundamental level, each staffer position exists to help the Members of Congress achieve their goals in Congress. Yet Members of Congress possess and pursue an amalgam of different goals. More specifically, as political scientists have observed, Members of Congress can be conceptualized as possessing—and as regularly acting upon—at least two distinct motivations. The Member often hopes to implement his or her preferred policies, but this Member also wants to get reelected.<sup>12</sup> In the staff structure that Congress has created for itself, these twin desires can be seen as projected out into the differing missions and job descriptions of various staff. Each staff position is tasked, in varying degree, with helping Members pursue one or both of these goals. *Committee legislative staff*, on the one hand, are designed to focus upon the accomplishment of policy goals. *Member communications staff*, on the other hand, exist to assist in the pursuit of reelection (or, less tangibly, in the pursuit by the Member of celebrity or a desirable public profile). *Member legislative staff*, meanwhile, are expected to adopt a hybrid focus that straddles these goals.

As interviews for this Article revealed, these differing job descriptions lead to a host of subsidiary differences across different staffer types. For *committee legislative staff*, a focus on policy development leads these staffers to possess high levels of: (1) policy specialization; (2) policy expertise;

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<sup>11</sup> In the staffer descriptions used in this Article, the first term identifies the type of office for which the individual works (*viz.*, whether that office is run by a committee, an individual Member of Congress, or party leadership). The second term identifies the staffer's area of focus within that office (e.g., whether they focus on advancing that office's legislative goals or its communications agenda).

<sup>12</sup> See generally RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* (1973).

(3) knowledge of particular bills; and (4) motivation to draft precise and accurate legislative products. For *Member legislative staff*, meanwhile, a hybrid focus that straddles policy development and reelection efforts leads these staffers, relative to their peers on committee legislative staff, to perform less well on the aforementioned dimensions. Finally, because *Member communications staff* adopt an exclusive focus on constituent relations and reelection efforts, they perform particularly poorly on each of these dimensions.

When these four dimensions all mutually reinforce each other, this Article argues, it is a potent indicator of reliability. In making this argument, the Article largely accepts and works within prevailing theories of what it means for legislative history to be “reliable.” Those who attempt some definition of this term typically posit that “reliability” means that legislative history accurately captures the underlying political deal or decision that it purports to describe.<sup>13</sup> William Eskridge has put important detail on this definition, associating reliability with the following questions:

How likely does this source reflect the views or assumptions of the enacting Congress? Is there a danger of strategic manipulation by individual Members or biased groups seeking to “pack” the legislative history? How well-informed is the source?<sup>14</sup>

This Article takes an approach to “reliability” that accepts the ideas embedded in Eskridge’s helpful questions. It assumes that, in order to accurately convey an underlying legislative deal, the author of legislative history must possess: (1) the competence or expertise needed to understand and articulate the deal; (2) actual knowledge of the deal; and (3) a professional motivation or incentive to report the deal with accuracy.

Using this common concept of “reliability,” this Article proposes that, based on the staffer differences it uncovers, statutory interpreters should adopt a new hierarchy of legislative history materials.<sup>15</sup> Within this hierarchy, priority is given to legislative history drafted by staff whose job

<sup>13</sup> See, e.g., *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring) (describing committee reports as most reliable because they describe the understanding of the Members who drafted and studied the legislation, and because they are used by other Members to understand the legislation); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) (“[A] congressional conference report is recognized as the most reliable evidence of congressional intent because it ‘represents the final statement of the terms agreed to by both houses.’” (citing *Dept. of Health and Welfare v. Block*, 784 F.2d 895, 901 (9th Cir. 1986))); *Congressional Drafting Part I*, *supra* note 5, at 975 (defining “reliability” as referring to “legislative history that actually does reflect the political deal that was made”).

<sup>14</sup> William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636 (1990).

<sup>15</sup> Under the conventional approach to legislative history, the different types of legislative history are ranked in a hierarchy of reliability. For review of the currently prevailing hierarchy, see *infra* Part VI.A. Some have argued, it should be noted, that the very idea of a hierarchy of legislative history is itself impractical or misleading. See, e.g., Nourse, *supra* note 5, at 109–10. See also Adrian Vermeule, *Legislative History and the Limits of Judicial Competence*, 50 STAN. L. REV. 1833, 1879–80 (1998) (noting that intentionalists often feel obligated to move from the hierarchy to more contextual, case-by-case assessments of reliability). None-

description focuses on policy development. By adopting this new hierarchy, interpreters can prioritize statements that are drafted by institutional actors who possess superior knowledge about the contents and goals of a bill, who have the greatest ability to accurately report those contents and goals, and who are under a heightened professional obligation to convey that information precisely and accurately.

This new interpretive hierarchy views legislative history, in order of decreasing reliability, as follows:

- (1) Committee reports;
- (2) All statements by a Chair or Ranking Member of a committee or subcommittee on a topic within committee or subcommittee jurisdiction;
- (3) Other markup and hearing statements;
- (4) Other floor statements.

It is a hierarchy that, in some cases, challenges prevailing wisdom. This is seen, for example, in the proposed hierarchy's contention that statements by a committee Chair or Ranking Member should be prioritized—a break with the currently-prevailing hierarchy, which instead prioritizes statements by the introducing Member or floor sponsor.<sup>16</sup> Similarly, this challenge is seen in the notion that hearing and markup statements are more reliable than floor statements.<sup>17</sup>

In other cases, the new hierarchy confirms prevailing wisdom, but it places that wisdom on new foundations. This is seen, for example, in the argument that committee reports are particularly reliable—but that this reliability is not attributable to Members personally developing both the committee report and the underlying bill.<sup>18</sup> Instead, it reveals that the reliability of these reports results from several previously-unobserved factors, including that: (1) they are drafted solely by committee legislative staffers, and (2)

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theless, this Article accepts the premises that it is possible to rank legislative history according to a hierarchy of reliability and that such a ranking is useful for the courts.

<sup>16</sup> On the currently prevailing hierarchy, see *infra* Part VI.A. On the conventional wisdom behind the prioritization of statements by the introducing Member or bill sponsor, see Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 389 (1995) (“[C]omments by a bill’s primary sponsor merit greater weight because the sponsor is familiar with the purposes of the legislation and other members tend to rely heavily on the views of sponsors in deciding what legislation means and how to vote.”); Eskridge, *supra* note 14, at 638 (“[S]ponsor remarks are prioritized] because the sponsors are the Members of Congress most likely to know what the proposed legislation is all about, and other Members can be expected to pay special heed to their characterizations of the legislation.”).

<sup>17</sup> On the traditional view, see, for example, Eskridge, *supra* note 14, at 639 (speaking uniformly of the reliability of “statements by legislators at hearings or on the floor”).

<sup>18</sup> On the traditional logic, see, for example, *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (“A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.”). See also *ESKRIDGE ET AL.*, *supra* note 8, at 982 (“Most legislation is essentially written in committee or subcommittee, and any collective statement by the members of that subgroup will represent the best-informed thought about what the proposed legislation is doing.”).

they are written documents attributed to institutional authors and thereby are not well-suited for television or social media.

In this way, the study conducted for this Article leads to a new hierarchy of legislative materials. At the same time, this study also uncovers a number of additional insights about the inner workings of the modern Congress—insights that have significant ramifications for the field of legislation. Two warrant comment at the outset.

First, the study finds that committee reports regularly undergo a particular type of review prior to publication: namely, review by committee legislative staff for the minority party. The discovery of this opposing-party review is noteworthy, as it reveals that a central debate in the field of legislation has been misguided. For decades, textualists and intentionalists have debated the significance of the fact that Members of Congress do not personally review committee reports.<sup>19</sup> In conducting this debate, both sides have accepted the premise that Member review is the primary mechanism to guard against nefarious staffers inserting misleading statements into these reports. The discovery of this opposing-party review practice reveals that, contrary to what the debating parties have assumed, Congress has developed an entirely different institutional mechanism to ensure report accuracy. It is a discovery that bolsters confidence that, contrary to assertions by some textualists, committee reports are not a fertile ground for nefarious, unchecked staffers to insert misleading material into the legislative record.<sup>20</sup>

Second, this study also brings previously-unnoticed congressional actors to the fore. Most notably, it does not appear that there has been any acknowledgment or discussion in the legal literature, prior to this Article, of a particular type of congressional staffer: the communications staffer.<sup>21</sup> Yet, as interviews for this Article revealed, this staffer now plays a central role in shaping the dialogue between Members of Congress and the public. In-

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<sup>19</sup> For a review of this debate, see *infra* Part VI.C.

<sup>20</sup> For the textualist arguments on this front—the most notable of which have been advanced by Justice Scalia and Judge Kozinski—see *infra* note 284 and accompanying text.

<sup>21</sup> For example, a search of Westlaw for law review articles containing the terms “Congress” and “communications staff” turned up no results of articles mentioning these staffers in Congress. Searched February 10, 2019. Westlaw search results. WESTLAW, <http://next.westlaw.com> (filter Content to only include “Secondary Sources” and then further filter for “Law Reviews & Journals”; use Advanced Search to find documents that have the term “Congress” and This Exact Phrase “communications staff”). While obviously not a perfect proxy for scholarly silence, this does capture the general blindness to these congressional actors. There has been some greater awareness of these staffers among political communications scholars, who have discussed the rise of press secretaries and of communications operations by congressional leadership. See generally TIMOTHY E. COOK, MAKING LAWS AND MAKING NEWS: MEDIA STRATEGIES IN THE U.S. HOUSE OF REPRESENTATIVES (1989); Amy Fried & Douglas B. Harris, *Governing with the Polls*, 72 HISTORIAN 321 (2010); Douglas B. Harris, *Recovering History and Discovering Data in the Archives: An Alternative Mode of Research for Congress Scholars*, in AN AMERICAN POLITICAL ARCHIVES READER 429 (Karen Dawley Paul et al. eds., 2009); Douglas B. Harris, *The Rise of the Public Speakership*, 113 POL. SCI. Q. 193 (1998); Michael J. Robinson, *Three Faces of Congressional Media*, in THE NEW CONGRESS 55 (Thomas E. Mann & Norman J. Ornstein eds., 1981).



ingly, these staffers are using floor speeches not as protracted arguments, for example, but instead as a series of staccato quips that are suited to the constraints of social media platforms. Through this and other reforms, communications staffers are remaking a Member-constituent dialogue that is central to the democratic architecture written into our Constitution.<sup>22</sup> The insertion of a new actor into this architecture is a significant event, and this Article begins to shine a light on the role this actor plays in the modern Congress, as well as to consider its implications.

The study found in the ensuing pages provides additional discoveries about the modern Congress as well. It offers further lessons for the practice of statutory interpretation, and it highlights a number of institutional reforms for consideration by Congress. Moreover, by showing the many insights that can be gained from a detailed study of the inner workings of Congress, it seeks to illustrate that there still are many lessons yet to be learned from the “process-based turn” in legislation scholarship.

This Article proceeds in six Parts. Part II outlines the universe of congressional staffers, thereby providing context for the subsequent study. The next three Parts present the findings of the study: Part III documents the differences between the three types of staffers who draft legislative history, Part IV chronicles the drafting assignments for legislative history in Congress, and Part V explains the underlying logic of these assignments. Part VI then details the implications that the study holds for statutory interpretation, as well as for potential institutional reform of Congress. Part VII briefly concludes.

## II. BACKGROUND: DIVISION OF LABOR IN CONGRESS

To understand the drafting assignments for legislative history in Congress, it can be useful to have some context about Congress’s divisions of labor. Within Congress, staffers divide into two broad categories. First, a number of staffers in Congress are *nonpartisan staffers*.<sup>23</sup> These staffers are employed by a nonpartisan legislative office that Congress has created for itself; consequently, they provide assistance to members of both political

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<sup>22</sup> For just a few of the many different scholarly approaches that converge on the idea that this Member-constituent dialogue is central to the constitutional scheme, see generally BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that the dualist structure of the Constitution is designed to require those with bold reform proposals to engage in sustained dialogue with the public over multiple election cycles); Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 742 (2012) (arguing that the Speech or Debate Clause enshrines a constitutional commitment to the value of communication with constituents).

<sup>23</sup> For discussions of various nonpartisan offices in Congress, see, for example, *Congressional Drafting Part II*, *supra* note 5, at 739–47 (discussing Offices of the Legislative Counsel); Gluck, *supra* note 8, at 187–91 (2017) (discussing Congressional Budget Office); Shobe, *supra* note 5, at 818–43 (discussing Offices of the Legislative Counsels and Congressional Research Service); Will Tress, *Lost Laws: What We Can’t Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 143–47 (2010) (discussing Law Revision Counsel and Offices of the Legislative Counsels).

parties inside Congress. Nonpartisan offices within Congress include the following:

- Offices of the Legislative Counsels;
- Congressional Budget Office;
- Congressional Research Service;
- Offices of the Parliamentarians;
- Law Revision Counsel.

Meanwhile, a second type of staffer also exists within Congress: the *partisan staffer*. Rather than working for the institution of Congress (and therefore providing assistance on a bipartisan basis), partisan staffers work on behalf of, and only provide assistance to, a specific partisan actor inside Congress.<sup>24</sup> There are three types of partisan staffers within Congress, and they are divided according to the category of partisan actor that employs them.

First, each *individual Member of Congress* is permitted to employ a number of partisan staffers (known colloquially as “Member staff” or “personal staff”).<sup>25</sup> As of 2016, Members of the House of Representatives employed an average of 7.22 staffers per Representative in their Washington offices,<sup>26</sup> while Senate offices employed an average of 23.42 such staffers per Senator.<sup>27</sup> Second, each *committee of Congress* employs both majority and minority staff. As of 2016, the committees of the House of Representatives employed an average of 54 staffers per committee (with the per-committee number varying from 18 to 119 staffers),<sup>28</sup> while the committees of the Senate employed an average of 52.95 staffers per committee (with the per-committee number varying from 14 to 133 staffers).<sup>29</sup> Finally, there are several partisan offices that, through their staff, work on a *chamber-wide basis* to coordinate party activity across Members and committees (known colloquially as “leadership staff”). As of 2016, House leadership offices employed a total of 239 individuals,<sup>30</sup> while Senate leadership offices employed 160 individuals.<sup>31</sup>

Each of these three partisan staff categories is subdivided, moreover, according to the nature of the tasks performed by the staff. For example, Member staff subdivides into the following categories: (1) office support staff; (2) legislative staff; (3) communications staff; and (4) supervisory staff.<sup>32</sup> Committee staff subdivides into the same categories, except that it

<sup>24</sup> See generally HOUSE STAFF, *supra* note 3; SENATE STAFF, *supra* note 3.

<sup>25</sup> See generally HOUSE STAFF, *supra* note 3; SENATE STAFF, *supra* note 3.

<sup>26</sup> HOUSE STAFF, *supra* note 3, at 12.

<sup>27</sup> SENATE STAFF, *supra* note 3, at 8.

<sup>28</sup> See HOUSE STAFF, *supra* note 3, at 13 (number excludes joint committees).

<sup>29</sup> See SENATE STAFF, *supra* note 3, at 9 (number excludes joint committees).

<sup>30</sup> HOUSE STAFF, *supra* note 3, at 6.

<sup>31</sup> SENATE STAFF, *supra* note 3, at 4.

<sup>32</sup> For a more detailed discussion of staff categorization, see generally CONG. RESEARCH SERV., STAFF PAY LEVELS FOR SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2001–2015

includes the additional category of oversight staff.<sup>33</sup> (Leadership staff have somewhat different subdivisions that are not relevant to this project, and consequently are not explored here.)

Taken together, this office-based staffing information provides a comprehensive view of modern congressional staff. A graphic depiction of that staff universe is offered in Figure 1.

Nonpartisan Offices					Partisan Staff									
Leg. Counsel	LRC	CRS	Parl. Office	CBO	Personal Staff			Committee Staff			Leadership Staff			
					Office Support Staff	Leg. Staff	Supervisory Staff	Comms Staff	Office Support Staff	Leg. Staff	Oversight Staff	Comms Staff	Supervisory Staff	[N/A]

Figure 1. Divisions of Labor in Congress.

As Figure 1 makes evident, the modern Congress is populated by a variety of institutional actors. This Article focuses its inquiry upon a specific subset of these congressional actors: namely, the staffers that produce the set of documents and statements that, taken together, courts refer to as “legislative history.” This raises the question: Of the many congressional actors identified in Figure 1, which actors are responsible for drafting the various types of legislative history?

Through interviews with congressional staffers that were conducted for this Article, it was discovered that three institutional actors within Congress generate the bulk of this legislative history: (1) committee legislative staff; (2) Member legislative staff; and (3) Member communications staff.<sup>34</sup> These three actors will be the focus of the study reported in Parts III through V. To assist the reader in understanding where these three actors fit within the larger institution of Congress, Figure 2 below highlights them (black box, white text).

(2016) [hereinafter HOUSE STAFF PAY LEVELS]; CONG. RESEARCH SERV., STAFF PAY LEVELS FOR SELECTED POSITIONS IN SENATORS’ OFFICES, FY 2001–FY 2015 (2016) [hereinafter SENATE STAFF PAY LEVELS]; CONG. RESEARCH SERV., CONGRESSIONAL STAFF: DUTIES AND FUNCTIONS OF SELECTED POSITIONS (2010), [hereinafter CONGRESSIONAL STAFF].

<sup>33</sup> See SENATE STAFF PAY LEVELS, *supra* note 32.

<sup>34</sup> See *infra* Parts III through V.

Nonpartisan Offices					Partisan Staff									
Leg. Counsel	LRC	CRS	Parl. Office	CBO	Personal Staff		Committee Staff			Leadership Staff				
					Office Support Staff	<b>Leg. Staff</b>	Supervisory Staff	<b>Comms Staff</b>	Office Support Staff	<b>Leg. Staff</b>	Oversight Staff	Comms Staff	Supervisory Staff	[N/A]

Figure 2. Divisions of Labor in Congress (Legislative History Drafters Highlighted).

III. DIFFERENCES BETWEEN STAFFER TYPES

As Part II explained, three types of staffer take the main responsibility for drafting legislative history in the modern Congress: (1) committee legislative staff; (2) Member legislative staff; and (3) Member communications staff. To better understand the nature of these staff positions, thirty congressional staffers were asked a host of questions about these positions. Together, these staffers have worked in eighty-four different positions within Congress. Interviewees were drawn from both parties, both chambers of Congress, and a wide range of committee and Member offices. They were selected in an effort to get perspectives from individuals with different positions and backgrounds in Congress, as well as from individuals at different points in their careers within Congress. The interviews were semi-structured in nature; planned questions were posed to interviewees that, while open-ended, nonetheless would permit for coding by response, and spontaneous follow-up questions were posed in order to invite interviewees to provide detail and elaboration on their initial answers.

Taken together, the answers from these staffers provide a composite portrait of each type of congressional staffer. This Part presents these composite portraits. The profile of each staffer type is divided into five categories with respect to which, according to interviewees, these staffers meaningfully differ. Those categories are: (1) job description; (2) portfolio; (3) policy expertise; (4) knowledge of individual bills; and (5) intended audience.

## A. Committee Legislative Staff

### 1. Job Description

The *committee legislative staffer* is directed, with the most single-minded focus, to assist Members in their goal of developing and pursuing policy objectives. According to interviewees, committee legislative staff are expected to cultivate policy expertise, and to bring that expertise to bear on legislative materials in order to ensure their precision and accuracy.<sup>35</sup> As one interviewee put it: “public policy is what [committee legislative staffers] do.”<sup>36</sup>

This exclusive focus upon national policy development is attributable, in part, to the fact that this staffer is a *legislative* staffer. Interviewees explained the significance of this label as follows:

- “The legislative side of congressional work is pretty focused on coming up with a policy, and working to make sure that the idea is put into legislative text—and when it reaches the Code, that it’s interpreted in the way that it was intended.”<sup>37</sup>
- “[Legislative staff] have to work on drafting legislation, and reading regulations . . . and [developing] the nitty-gritty of the policy, rather than the overall conversations with press and pushing stories.”<sup>38</sup>
- “The legislative team is developing all your substance [and] doing anything policy-related. They are the subject-matter experts. . . . The ‘leg’ team is doing substantive work that requires the analysis of the actual underlying law and policy.”<sup>39</sup>

As the interview responses made clear, legislative staff in Congress have a job description that prioritizes the development, and the proper implementation, of policy objectives.<sup>40</sup>

This legislative focus is heightened by the fact that these staffers are employed by a unique type of institution—a committee—rather than by a Member of Congress. As interviewees explained, employment by a Member of Congress unavoidably entails a focus on advancing the Member’s goal of

<sup>35</sup> For background on the role of committee legislative staff, see *supra* Part II and accompanying text.

<sup>36</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>37</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.

<sup>38</sup> Interview with No. 24, Cong. Staffer, in Wash., D.C.

<sup>39</sup> Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>40</sup> See Interview with No. 12, Cong. Staffer, in Wash., D.C. (“The legislative staff focuses mostly on analyzing and coming up with legislation—making policy recommendations.”); Interview with No. 6, Cong. Staffer, in Wash., D.C. (“[Legislative staff’s] goal is more developing good policy. . . . They design and assemble the car. . . . They’re like engineers—they decided to put fuel injection in the engine instead of a carburetor, and they’ll talk to you until you fall asleep about the merits of doing that.”); Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.

reelection. This leads to a myopic focus on the Member's constituency—a focus that often exists in tension with the goal of developing and coherently articulating national policy. By contrast, committee staffers are liberated from these electoral concerns, and they therefore can focus squarely upon national policy development.<sup>41</sup> As interviewees described it:

- “The lens is different, I guess is the best way to describe it. The committee has a jurisdictional lens, it has a historical lens that a Member's office may not have. Their lens is much more their district—the stakeholders, their personal political beliefs. But it's not as long-looking.”<sup>42</sup>
- “Usually with Member offices, it's very constituency-focused, in my experience at least. And for committee staff, it's both constituency, Member-district [focused] but also thinking about the bigger picture and what the goal is for the legislation.”<sup>43</sup>
- “Committee staff are more [focused] at a national level, looking at things as a whole in the big picture of things, instead of catering to one specific constituency or one specific part of the country.”<sup>44</sup>
- “Personal offices also really get bogged down in the parochial issues of their state or their district in a way that [committees do not]. . . . The committee ha[s] a more national focus. . . . You started with the idea that you were going to try to make good policy. Now, of course, that gets shot to hell when you negotiate anyway. But at least starting from a purer place.”<sup>45</sup>

In short, committee legislative staff is tasked with focusing upon national policy development for legislation, and the position is rationally structured in order to insulate the staffer from parochial constituency-based concerns. The position is designed to allow the staffer to cultivate policy expertise—and to employ that expertise in the development and negotiation of legislation. This job description shapes all facets of the job, as seen in the domains discussed below.

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<sup>41</sup> See, e.g., Interview with No. 9, Cong. Staffer, in Wash., D.C. (“Personal office staff, their job is to get their Member wins. Committee staff [are] in charge of the programs. . . . We also have to think about just keeping the programs strong and sound.”); Interview with No. 16, Cong. Staffer, in Wash., D.C. (“On the committee level, they're not thinking so much about constituents. They're thinking a lot more of the programs that their jurisdiction covers.”); see also Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>42</sup> Interview with No. 20, Cong. Staffer, in Wash., D.C.

<sup>43</sup> Interview with No. 24, Cong. Staffer, in Wash., D.C.

<sup>44</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.

<sup>45</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

## 2. *Portfolio / Specialization*

Among the different types of congressional staffers, committee legislative staffs have the narrowest legislative portfolios. Interviewees for this Article provided robust consensus on this point; twenty-three interviewees advanced this assertion, while none contradicted it. As one interviewee succinctly put it: “Committee [legislative] staff are the specialists.”<sup>46</sup>

In part, the narrowness of these staffers’ portfolios is attributable to the fact that they are employees of a committee with a fixed jurisdiction. According to interviewees, however, committee legislative staffers additionally specialize by topic to a far greater extent than is required by their jurisdictional constraints. Committee legislative staffers, they reported, often will have a portfolio that is limited not only to a specific topic (e.g., health care or agriculture), nor only to a specific program within that topic (e.g., Medicaid or the SNAP program), but also to a specific subset of a program (e.g., Part B of the Medicare program).<sup>47</sup> Moreover, interviewees noted, committee legislative staffers do not have portfolios that include non-legislative tasks, such as responding to constituent mail, that some Member legislative staff may be expected to perform.<sup>48</sup>

Two interviewees also mentioned the possibility that committee legislative staffers in the Senate may have narrower portfolios than their counterparts in the House.<sup>49</sup> However, one of these interviewees also emphasized that the portfolio difference across chambers was not as significant as the portfolio difference across staffer types, as those staffer types are sorted in this Part.<sup>50</sup>

## 3. *Policy Expertise*

Among congressional staffers, committee legislative staffers also possess the most policy expertise. Twenty-one interviewees asserted that committee legislative staffers possess a policy expertise that is superior to that of their peers, while none contradicted this claim. As one interviewee put it:

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<sup>46</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>47</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 17, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 27, Cong. Staffer, in Wash., D.C.

<sup>48</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>49</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>50</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

“Committee [legislative] staff is expected to be the subject matter experts.”<sup>51</sup>

Interviewees noted four different features of the job that ensure this superior policy expertise. First, as discussed above, committee legislative staff specialize to a greater degree than do their peers. The narrowness of their portfolios allows committee legislative staffers to study their assigned policy areas at a high level of depth and detail.<sup>52</sup> As one interviewee put it: “When you specialize that deeply, you’re going to naturally wind up with people who are much more expert on it. If they weren’t at the beginning, they will be after a year. Because that’s all they’ve studied for a year.”<sup>53</sup> Interviewees mentioned that the narrowness of the portfolios permits committee legislative staff to have superior in-depth knowledge of both statutory text<sup>54</sup> and regulatory developments.<sup>55</sup>

Second, this superior policy expertise is compounded by the fact that, relative to their peers, committee legislative staff remain in their positions for longer durations. Studies by the Congressional Research Service (CRS) have documented this fact about staff tenure; as these studies have chronicled, committee legislative staff retain their positions for modestly longer tenures, on average, than do committee communications staffers, Member legislative staffers, or Member communications staffers.<sup>56</sup> These CRS studies were based on data sets that had several acknowledged shortcomings,<sup>57</sup> but interviewees provided anecdotal evidence suggesting that these shortcomings may have led the CRS studies, if anything, to understate the tenure gaps between committee legislative staffers and their peers.<sup>58</sup> Interviewees

<sup>51</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>52</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>53</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

<sup>54</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>55</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.

<sup>56</sup> On committee communications staff, see CONG. RESEARCH SERV., STAFF TENURE IN SELECTED POSITIONS IN HOUSE COMMITTEES, 2006–2016 7 (2016) [hereinafter HOUSE COMMITTEE STAFF TENURE]; CONG. RESEARCH SERV., STAFF TENURE IN SELECTED POSITIONS IN SENATE COMMITTEES, 2006–2016 7 (2016) [hereinafter SENATE COMMITTEE STAFF TENURE]. On Member legislative staffers and Member communications staffers, see CONG. RESEARCH SERV., STAFF TENURE IN SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2006–2016 7 (2016) [hereinafter HOUSE MEMBER STAFF TENURE].

<sup>57</sup> See HOUSE COMMITTEE STAFF TENURE, *supra* note 56, at 2–7; SENATE COMMITTEE STAFF TENURE, *supra* note 56, at 2–7; HOUSE MEMBER STAFF TENURE, *supra* note 56, at 2–7.

<sup>58</sup> Several interviewees noted tenure gaps and turnover concerns as exacerbating gaps in policy experience. See Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C. Many committee legislative staffers described internal promotion practices, and



pointed to staff tenure gaps as exacerbating the effects of specialization, whereby committee legislative staff possess greater policy expertise than do their peers.

Third, these staffers possess superior policy expertise on account of committee hiring and staffing practices.<sup>59</sup> Interviewees consistently described two backgrounds that committees seek out for legislative staffer positions: experience doing legislative work in Member offices or time spent developing expertise in the private sector or executive agencies.<sup>60</sup> Each of these backgrounds ensures that committee legislative staffers possess policy expertise. As one interviewee explained:

At the committees, I think that they do tend to hire for specific policy expertise. [Committees] hire a fair number of people who acquired their policy expertise working their way up, through Member [offices], working on legislative issues. [They also] get some people who have graduate degrees in the specific areas, and then for some kinds of expertise, [they] get people from the agencies.<sup>61</sup>

When hiring for committee legislative staff, committees also will seek out individuals with advanced degrees in law and policy—a prioritization of policy-based educational experience to an extent not seen in other staff positions.<sup>62</sup> By hiring individuals with both professional and educational backgrounds in policy-related work, committees ensure that their legislative staffs possess high levels of policy expertise.

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experience moving back and forth between committees and agencies, that would lead the CRS studies to reset their tenure count. *See, e.g.*, Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>59</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 4, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; Interview with No. 27, Cong. Staffer, in Wash., D.C.

<sup>60</sup> On these two paths, see Interview with No. 19, Cong. Staffer, in Wash., D.C. On the path from Member staff, see Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C. On the path from an agency or the private sector, see Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>61</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>62</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; Interview with No. 27, Cong. Staffer, in Wash., D.C.

Fourth, this superior policy expertise is further compounded by the fact that these staffers have greater access to outside experts. As one committee legislative staffer put it:

With our stuff, too, it's not just us. We get access to support that the personal offices don't have access to. . . . We get so much support from the implementers . . . we get a lot of support from CBO [i.e., the Congressional Budget Office], we can even tap into [congressional commissions], so we're getting support from people who also are as expert as we are in these areas that the personal offices don't have access to.<sup>63</sup>

In some cases, this differential access to outside experts is even required by law. The statute that created the House Office of the Legislative Counsel, for example, requires attorneys in that drafting office to prioritize committee inquiries over Member-office inquiries.<sup>64</sup>

Two interviewees also suggested that, among committee legislative staffers, some gap in policy experience may exist across chambers.<sup>65</sup> Specifically, they suggested that committee legislative staff in the Senate may have superior expertise on average. One interviewee attributed this to a greater degree of specialization in the Senate staff,<sup>66</sup> while the other attributed it to the slower pace of the Senate.<sup>67</sup>

#### 4. *Knowledge of Bill*

Committee legislative staff have high levels of direct exposure to, and intimate knowledge of, the contents of individual bills. They regularly develop policies for bills that move through Congress—and they will work with the Offices of the Legislative Counsel to develop the text for those bills. Moreover, when committee legislative staff is tasked with drafting legislative history for a bill that was developed at the committee level, they typically will assign the drafting of that legislative history to the same staffer who developed the underlying bill.<sup>68</sup> In this way, committee legislative staffs ensure that, when drafting legislative history, they are able to leverage their institutional knowledge about a given bill.

This sets committee legislative staff apart, in particular, from communications staffers (as discussed in greater detail in Part III.C). Evidence was less compelling regarding the differences between committee legislative staff and Member legislative staff on this point. Five interviewees asserted

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<sup>63</sup> Interview with No. 19, Cong. Staffer, in Wash., D.C.

<sup>64</sup> See 2 U.S.C. § 281b (2018).

<sup>65</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>66</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

<sup>67</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>68</sup> See *infra* Part IV.A.

that committee legislative staff has superior knowledge of individual bills, while two interviewees posited that knowledge of bills was too varied to permit generalization. While not indisputable, therefore, the interviews nonetheless allowed for a tentative conclusion that, in the words of one interviewee: “The Member offices usually depend a lot on the committee staff for information about the bill, and [for] understanding the bill . . . [whereas] at the committee, we deal a little more with original source material.”<sup>69</sup>

### 5. *Intended Audience*

A number of interviewees volunteered the idea that committee legislative staff, by virtue of their job description, consistently target a specific intended audience with their documents and statements: legal implementers.<sup>70</sup> This includes both courts and executive agencies.<sup>71</sup> Interviewees also reported that, when addressing legal implementers, congressional staffers generally strive for honesty, accuracy, and precision.<sup>72</sup> According to the interviewees, a good-faith effort is made to convey congressional intent to these audiences<sup>73</sup> and to provide them with Congress’s understanding of the underlying policy arguments.<sup>74</sup>

The description of this goal—i.e., of accurate communication with implementers—fits with the fact that, more broadly, interviewees described committee legislative staff as under a heightened expectation to promote and ensure statement accuracy.<sup>75</sup> As interviewees put it:

<sup>69</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>70</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>71</sup> On agencies, see Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C. On courts, see Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>72</sup> See Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>73</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>74</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.

<sup>75</sup> See, e.g., Interview with No. 26, Cong. Staffer, in Wash., D.C. (“The policy people [on committee] are responsible [for] the factual accuracy of it.”); see also Interview with No. 1,

- “[Committee legislative staffers] would edit for substance. Make sure everything is correct, making sure that the representations of the legislation is correct.”<sup>76</sup>
- “If our ‘leg’ folks [on committee] write them, then you know that they’re going to be factually accurate.”<sup>77</sup>

Admittedly, there is reason to view these audience-related claims with some skepticism, as interviewees might be expected to describe even misleading statements as accurate (as part of an effort to induce reliance on those statements). Yet, as Sections III.B and III.C will illustrate, interviewees were not afraid to confess that certain staffs, when targeting certain audiences, do pursue goals other than accurate and precise communication. In so doing, interviewees provided some reason to believe the assertions that committee legislative staffers, when addressing legal implementers, strive for accuracy.

## B. Member Legislative Staff

### 1. Job Description

The Member legislative staffer is best understood as a hybrid actor who is expected to straddle, and simultaneously pursue, the two Member goals noted above (namely, achieving policy objectives and achieving Member reelection).

On the one hand, Member legislative staffers are, as their name implies, *legislative* staffers. Consequently, their job description is focused upon policy development.<sup>78</sup> In the office of an individual Member of Congress, it is the Member legislative staffers who take responsibility for understanding public policy, for assisting the Member in decision-making with respect to public policy, and for ensuring accuracy in the Member’s statements regarding public policy.

At the same time, however, the Member legislative staffer still works for a specific Member of Congress. As a consequence, the Member legislative staffer also is expected to adopt a district-centric or state-centric focus,

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Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.

<sup>76</sup> Interview with No. 27, Cong. Staffer, in Wash., D.C.

<sup>77</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>78</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 12, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; Interview with No. 27, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C. For quotations by interviewees that explain the implications of the “legislative staffer” label, see *supra* Part III.A.

with an eye toward constituents and reelection. Gluck and Bressman previously documented this dimension of the Member legislative staff position, and interviews for this article confirmed their findings.<sup>79</sup> Describing this constituency-oriented component of the Member legislative staff position, interviewees said:

- “[Member staff] are trying to ultimately to make all of [their] work reflect [their] constituents and [their] district, and back home.”<sup>80</sup>
- “Personal office staff, their job is to get their Member wins.”<sup>81</sup>
- “Usually with Member offices, it’s very constituency-focused.”<sup>82</sup>
- “[In terms of] priorities . . . sometimes it’s just [that, for Member legislative staffers,] politics takes over. And that’s a different priority.”<sup>83</sup>
- “You’re developing an expertise in running it through the code-switcher or prism of the [state’s or district’s] interests.”<sup>84</sup>

While directed to focus on policy development, therefore, Member legislative staff nonetheless are expected to retain a knowledge of, and to focus upon, the goals of the Member with his or her constituency.<sup>85</sup> In this way, the position of Member legislative staffer is one that is expected to straddle the twin goals of advancing policy objectives, on the one hand, and pursuing Member reelection, on the other hand. This hybrid quality of the Member legislative staffer is reflected in many aspects of the job, as discussed below.

## 2. *Portfolio / Specialization*

The hybrid nature of this staff position is evident, for example, in the breadth of the policy portfolios assigned to these staffers. Member legisla-

<sup>79</sup> *Congressional Drafting Part II*, *supra* note 5, at 755–56.

<sup>80</sup> Interview with No. 16, Cong. Staffer, in Wash., D.C.

<sup>81</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.; *see also* interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>82</sup> Interview with No. 24, Cong. Staffer, in Wash., D.C.

<sup>83</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>84</sup> Interview with No. 29, Cong. Staffer, in Wash., D.C. *See also* Interview with No. 5 Cong. Staffer, in Wash., D.C.; Interview with No. 18 Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.

<sup>85</sup> Interview with No. 19, Cong. Staffer, in Wash., D.C. (“Member staff is much more in tune to the district, and what’s going on there.”); Interview with No. 22, Cong. Staffer, in Wash., D.C. (“You can either ask district-centric questions, or higher-level questions—basically, ‘What do you think of cuts to [a specific] industry?’ As opposed to . . . ‘My district has [an affected] facility that’s been cut thirteen percent, can you talk to that?’ So, one would be a committee-add question, one would be a personal office question.”); Interview with No. 11, Cong. Staffer, in Wash., D.C. (“Personal offices also really get bogged down in the parochial issues of their state or their district in a way that [committees do not].”).

tive staff usually do specialize, at least to some extent, by content area.<sup>86</sup> Interviewees consistently reported that a Member legislative staffer typically would be assigned a portfolio that was limited to a specific subset of policy areas.<sup>87</sup> Relatedly, sixteen interviewees mentioned that Member legislative staff have narrower portfolios than Member communications staff, and zero interviewees contradicted this claim.<sup>88</sup>

Nonetheless, Member legislative staffers have much broader portfolios than do their committee counterparts. This is particularly true of Member legislative staffers in the House of Representatives, where Member legislative staffers will be responsible—by themselves—for a startlingly large number of different policy areas.<sup>89</sup> Describing this phenomenon, staffers remarked:

- “[In a personal office,] you generally have three staffers that’re in charge of [monitoring] the entirety of the federal government. . . . Imagine you’re in a meeting on health care, you’re watching a floor vote on transportation because you’re going to have vote recs ready to go, you’ve got [Legislative Counsel] calling you on an energy bill you have going, and the boss comes in and asks a question about tax reform. It is impossible for anyone to know everything about any of those issues, [much less know everything about each] branch of one of those issues.”<sup>90</sup>
- “If you’re a staffer for a House member, you’re usually handling several different issues. I would say—I think I handle seven. So, you have to be able to switch gears, and learn—be talking about health care one minute, and talking about agriculture the next, and then education later in the day.”<sup>91</sup>

In the House, moreover, Member legislative staffers also will handle non-legislative tasks on occasion. These tasks might include speechwriting,<sup>92</sup>

<sup>86</sup> *But see* Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C. (suggesting that, occasionally, a single legislative staffer might cover all issues).

<sup>87</sup> Fifteen interviewees gave examples of typical Member legislative portfolios, for example, that were limited to specific policy areas.

<sup>88</sup> Member communications staff do not specialize by policy area.

<sup>89</sup> *See, e.g.*, Interview with No. 9, Cong. Staffer, in Wash., D.C. (“As personal office staff . . . [you might have a portfolio that covers] health, veterans, education, and labor.”); Interview with No. 11, Cong. Staffer, in Wash., D.C. (“Personal office staff have huge portfolios—they need to know everything.”); Interview with No. 16, Cong. Staffer, in Wash., D.C. (“It’s fun, because you do get to learn about a lot of different things. But then sometimes, you’re just like, oh man, I cover the postal service, and there’s a postal bill on the floor that I know nothing about—who am I going to call to get the read on this?”); *see also* Interview with No. 20, Cong. Staffer, in Wash., D.C.

<sup>90</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.

<sup>91</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>92</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

drafting of constituent mail,<sup>93</sup> holding of constituent meetings,<sup>94</sup> and managing of “parochial issues” that may arise.<sup>95</sup> As one interviewee put it: “You have to do all kinds of things. You’re spread way more thin.”<sup>96</sup>

In the Senate, by contrast, Member legislative staffers typically have more manageable portfolios. As one interviewee put it: “In the Senate, you can have just one or two issues.”<sup>97</sup> Moreover, Member legislative staffers in the Senate typically are not required to handle non-legislative tasks.<sup>98</sup> Nonetheless, Member legislative staffers in the Senate still have portfolios that, when compared to those of committee legislative staff, are very broad. A Member legislative staffer in the Senate typically will handle, without assistance, the entirety of a single policy area—where a “policy area” is defined as a broad subject-area (such as agriculture, defense, transportation, or health). As a result, even interviewees who suggested that a House-Senate specialization gap existed nonetheless underscored the fact that, even in the Senate, there also remains a significant specialization gap between committee legislative staff and Member legislative staff.<sup>99</sup>

### 3. *Policy Expertise*

Relative to their congressional peers, Member legislative staff possess an intermediate level of policy expertise. On the one hand, Member legislative staffers generally possess a lower level of policy expertise than do committee legislative staff. As discussed above, twenty-one interviewees supported this claim, while none contradicted it. As one Member legislative staffer put it: “I don’t scratch the surface of committee [legislative staff’s] knowledge about policy. I can’t hold a candle to them.”<sup>100</sup>

On the other hand, Member legislative staffers still do possess some policy expertise—a trait that distinguishes them from Member communications staffers. Sixteen interviewees mentioned that, relative to Member com-

<sup>93</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>94</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.

<sup>95</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C. “Parochial issues” often involve local disputes or problems that the Member may be able to resolve or influence simply by exerting informal pressure on governmental or private actors, such as by calling an executive agency to lobby on behalf of certain treatment for local businesses.

<sup>96</sup> Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>97</sup> Interview with No. 17, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 4, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>98</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>99</sup> *See* Interview with No. 23, Cong. Staffer, in Wash., D.C. (“There’s definitely a gap [in specialization].”) *But see* interview with No. 29, Cong. Staffer, in Wash., D.C. (giving mixed information on this element).

<sup>100</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.

munications staff, Member legislative staff possess superior expertise, while no interviewees contradicted this claim.

In part, this intermediate level of policy expertise is linked, once again, to the varying levels of staff specialization. By covering more policy topics than would a committee legislative staffer, the Member legislative staffer is not afforded the opportunity to cultivate a comparable level of policy expertise while on the job. According to one interviewee: “On the personal staff side, you have to know a little bit about everything. [As a result, you need to] know who to ask, where to find information if you don’t know what you’re talking about . . . [because] it’s not something that you’ve studied or learned in your time as a staffer.”<sup>101</sup>

Inside Congress, this knowledge gap with committee legislative staff—and its connection to the narrowness of staffer portfolios—is captured in an oft-repeated analogy. Whereas committee legislative staffers have portfolios that are “an inch wide and a mile deep,” it is said, Member legislative staffers have portfolios that are “a mile wide and an inch deep.” Nine different interviewees used this metaphor. Elaborating upon the logic behind this phrase, one interviewee noted: “On the committee, because of that [narrower focus], the staff are really, really experts in their one area . . . . Whereas in the personal office . . . it’s not uncommon to also cover four or five issues that you really don’t know much about, and [the staffer is] just kind of learning on-the-go.”<sup>102</sup> In other words, Member offices do not hire legislative staff in numbers that permit them to subdivide work to the extent that occurs on committees—and, as a result, Member legislative staffers find that: “You’re just stretched thinner.”<sup>103</sup>

The intermediate level of policy expertise among Member legislative staff is also attributable to Member hiring and staffing decisions. On the one hand, Member legislative staff will be selected partly due to their ability (or, at least, their promise) with respect to substantive policy development.<sup>104</sup> On the other hand, however, Member legislative staff also will be selected, in many instances, for their knowledge of the Member’s constituency—a competing hiring interest that detracts from Member efforts to seek out individuals with policy expertise.<sup>105</sup> As one interviewee put it: “Oftentimes . . . you

<sup>101</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; see also Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.

<sup>102</sup> Interview with No. 16, Cong. Staffer, in Wash., D.C.

<sup>103</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>104</sup> See Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 4, Cong. Staffer, in Wash., D.C.; Interview with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C. (describing the varying extents to which Member offices hire for policy expertise).

<sup>105</sup> On the hiring priority for individuals from the home state or district, see Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C. On the lower priority given to hiring for policy expertise generally, see Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 4, Cong. Staffer, in Wash., D.C.; Interview



have a Member that will get someone from their geography . . . . That may be more important to a Member than someone with a law degree, or someone who has an MBA, or someone who has [a certain] number of years in the field."<sup>106</sup> Moreover, even if Member legislative staff is hired for policy expertise in some areas, the breadth of the staffer's portfolio necessarily means that he or she will cover issues beyond the staffer's realm of expertise.<sup>107</sup>

Finally, two interviewees also mentioned the possibility that Senate Member legislative staff may, on average, possess a level of policy expertise that is superior to that of their counterparts in the House.<sup>108</sup> However, the low number of interviewees who raised this chamber-to-chamber comparison makes it difficult to draw conclusions on this matter.

#### 4. *Knowledge of Bill*

The number of interviewees who discussed staffer differences regarding exposure to, and knowledge of, individual bills was relatively small. As a consequence, the conclusions that can be drawn on this topic are tentative. Nonetheless, among those interviewees who did raise this issue, Member legislative staff were consistently described as possessing an intermediate level of knowledge about individual bills in Congress.

On the one hand, interviewees asserted that Member legislative staff typically have a smaller amount of direct exposure to individual bills than do committee legislative staff, as Part III.A documented. Among those who suggested that Member legislative staff have lower levels of exposure to (and knowledge of) individual bills, several emphasized the idea that Member legislative staff often gain knowledge of a bill's contents by reading summary materials furnished to them by committee staff, whereas committee legislative staff are more likely to gain their knowledge of a bill by developing or reading the actual bill text.<sup>109</sup> As one interviewee remarked: "Very often [the Member legislative staffer] would have been involved in the negotiations within the committees over a bill, but they wouldn't have held first

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with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>106</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.

<sup>107</sup> Several interviewees emphasized that the tenure gap contributes to a concomitant gap in policy expertise between legislative staffs at the Member and committee levels. *See, e.g.*, Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>108</sup> Interview with No. 12, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C. *But see* Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>109</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.

pen, they wouldn't have interacted with Leg[islative] Counsel, except maybe on an amendment that they were issuing in markup."<sup>110</sup>

On the other hand, interviewees made it clear that Member legislative staff certainly have more interactions with legislative materials than do Member communications staffers. Admittedly, only five staffers explicitly offered this comparative assessment—yet zero interviewees contradicted it. Moreover, interviewees seemingly omitted this information because it was viewed as too obvious to warrant comment; when explicitly asked about it, several interviewees laughed at the question, for example. It was common-sense to these interviewees that, while Member legislative staff may have varied exposure to individual bills in Congress, Member communications staff are uniformly devoid of this exposure. Summarizing this difference, one interviewee explained: “They’re generally two distinct roles—[and only] one is focused on the policy and the bill text.”<sup>111</sup>

### 5. *Intended Audience*

Interviewees suggested that, when Member legislative staff draft legislative history, they tend to target a hybrid audience. Relative to committee legislative staff, it was claimed, Member legislative staff draft legislative history with a greater focus on communicating to the Member’s local constituency.<sup>112</sup> Relative to Member communications staff, however, it was claimed that Member legislative staff draft with an increased focus on communicating with implementers and regulated entities.<sup>113</sup> The result, therefore, was an image of Member legislative staff as staff whose job description is split between two Member objectives—namely, reelection and achieving policy goals—and who consequently must draft legislative history in a way that balances competing objectives of reaching implementers, on the one hand, and of persuading potential voters, on the other hand.

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<sup>110</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

<sup>111</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.

<sup>112</sup> *Id.*; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 18, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>113</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

### C. *Member Communications Staff*

#### 1. *Job Description*

Of the various types of congressional staff, the Member communications staffer is most squarely focused upon the goal of Member reelection. This is not to say that Member communications staffs perform campaign work in any narrow or technical sense (something that, if true, would constitute a violation of chamber ethics rules).<sup>114</sup> Rather, they are focused more broadly upon the task of promoting a positive perception of the Member among the general public. In the words of one interviewee, the Member communications staff is: “A team that is generating the [Member’s] public image.”<sup>115</sup> To this end, their job description focuses on the task of communicating persuasively with the public—and, in particular, with the constituents of an individual Member of Congress. While this communication may be done primarily to inform the public about the viewpoints or actions of the Member, it inevitably is done with an eye toward eventual electoral consequences.

The job description for Member communications staff is focused, therefore, on the task of shaping communications for a particular audience. In part, it is an audience of busy generalists with limited bandwidth. Consequently, these staffers are expected to put Member ideas and viewpoints into language that is accessible and brief. Several interviewees referred to this as a “translation” function of the position,<sup>116</sup> while others described it as the task of putting things “in layman’s terms.”<sup>117</sup> Elaborating, interviewees said:

- “You want the ‘comms’ people to come in and explain how this affects the everyday person. Not the judicial side, not the legal side. . . . That’s the role they play.”<sup>118</sup>
- “Communications staff . . . tend to just boil a complicated subject down to two or three sentences at most, to get that out to the public.”<sup>119</sup>
- “Communications is geared toward speaking to an audience of non-experts.”<sup>120</sup>

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<sup>114</sup> For the applicable House rule, see COMM. ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHICS MANUAL 121–42 (2008), [https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008\\_House\\_Ethics\\_Manual.pdf](https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf) [<https://perma.cc/8BGL-5RKF>].

<sup>115</sup> Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>116</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.

<sup>117</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>118</sup> Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>119</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.

<sup>120</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 5, Cong. Staffer, in Wash., D.C. (“[Their job is to] cut to the core essence of an issue to communicate it to a layman who might not know anything about a given issue.”); Interview with No.

Moreover, Member communications staff also must shape these communications for an audience with a specific set of parochial concerns. As a result, their communications are expected to be framed specifically to appeal to constituents residing in the state or district of the Member. As one interviewee put it, Member communications staff “is focused on making sure that they can communicate the goals and ideas of the Member to the constituency.”<sup>121</sup>

Additionally, Member communications staff are expected to shape communications in a way that takes advantage of the current media ecosystem. They are supposed to possess in-depth knowledge about the media outlets that function as intermediaries between the Member and his or her constituency. Commenting on this element of the position, interviewees observed:

- “The communications department’s . . . expertise is in the media and in speaking to a mass audience.”<sup>122</sup>
- “Communications staff tend to be very media focused, more soundbites and tweets.”<sup>123</sup>
- “They have their finger on the pulse of [how] the media works and how best to get the message out.”<sup>124</sup>

In part, this element of the job requires an expertise in traditional media, such as newspapers and television. As interviewees remarked:

- “So much of their role is managing relations with reporters.”<sup>125</sup>
- “I don’t even know what they do all day every day except talk to reporters.”<sup>126</sup>
- “That’s where the ‘comms’ people come in—they’ve got to go sell it to the reporters, sell it to the press.”<sup>127</sup>
- “Anything blasted out as a press statement or a press release . . . that’s where the communications team tends to come in.”<sup>128</sup>

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1, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C. (“They have to try to channel complex policy issues into understandable forms for people.”); Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 17, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>121</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>122</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>123</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.

<sup>124</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.; *see also id.* (“[Member communications staff understands how] the media works and how best to get the message out.”).

<sup>125</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

<sup>126</sup> Interview with No. 24, Cong. Staffer, in Wash., D.C.

<sup>127</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.

<sup>128</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 15, Cong. Staffer, in Wash., D.C. (“Our communications director does a lot of the strategic communications—like [deciding] what Op-Ed on what topic in what national paper. . . . And then we have a press secretary who’s much more focused on the day-to-day of making sure our

Member communications staffers also bring an expertise in navigating the modern media landscape—including internet and social media outlets (such as Facebook, YouTube, and Twitter). On this point, interviewees remarked:

- “In [2018, Member communications staff] have distribution channels to take what is spoken on the floor and distribute it out to mass numbers of people. Even if the media isn’t interested in something that goes on there, we can take the video, we can post it on Facebook, we can post it on Twitter, and we can reach nearly a mass audience that way.”<sup>129</sup>
- “We have a press secretary who’s much more focused on the day-to-day of . . . making sure we have three tweets a day, or whatever Facebook post needs to go up.”<sup>130</sup>
- “They will record what the Member is doing . . . and then put that out on social media.”<sup>131</sup>
- “Pretty much anything that lives online [is the purview of Member communications staffers.]”<sup>132</sup>
- “[Member] communications staff repackage [some statements] into press releases, newsletters—and, with the advent of social media, as videos to push out to any Member’s social media following.”<sup>133</sup>

What does it mean, then, for Member communications staffers to have an expertise in crafting statements for media outlets, whether traditional or new media? In part, it means that they are expected to use tactics of persuasion that, over the past half-century, have developed in the modern media context. Colloquially, these tactics often are referred to as “messaging” or “spin.”<sup>134</sup> One interviewee offered an illuminative analogy about the nature of these tactics: if legislative staff are the engineers of Congress—the individuals who design and structure policies—then communications staff are the car salesmen of Congress.<sup>135</sup>

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press releases go out on our bills.”); Interview with No. 24, Cong. Staffer, in Wash., D.C. (“Their focus is working with the press, getting stories out, getting our message out.”).

<sup>129</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>130</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.

<sup>131</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>132</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>133</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 12, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>134</sup> For references to this work as “messaging,” see Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C. On “spin,” see Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.

<sup>135</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

Other interviewees reinforced this observation about the marketing-oriented nature of this staffer position. To this end, interviewees offered the following comments:

- “Press is a combination of writing and telemarketing.”<sup>136</sup>
- “[The communications director will] make sure everything is in harmony with what our larger . . . branding goals are with [the Member].”<sup>137</sup>
- “They have to sell it.”<sup>138</sup>
- “The legislative people don’t know how to take all that minutiae that they do . . . and turn it into a sellable message.”<sup>139</sup>
- “Their role is descriptive storytelling.”<sup>140</sup>

## 2. *Portfolio / Specialization*

Unlike legislative staffers, Member communications staffers do not specialize by policy area. Instead, a Member communications staffer is expected to generate communications with respect to the full range of policy topics that arise in Congress. Consequently, among the sixteen interviewees who mentioned the issue of specialization with respect to Member communications staffers, all sixteen reported that member communications staffers handle a broader policy portfolio than do their peers. As one interviewee remarked about Member communications staffers: “They need to be able to talk about everything.”<sup>141</sup>

Some Member communications staffs—especially in the House—could not specialize by policy area even if they desired to do so, simply because the Member employs only a single communications staffer.<sup>142</sup> Even when a Member does retain a communications department consisting of multiple staffers, the department will specialize along some axis other than policy area. Interviewees reported a variety of axes that are used for this purpose, including: (1) digital versus traditional media;<sup>143</sup> (2) senior versus junior staff;<sup>144</sup> (3) long-term strategy planning versus daily messaging;<sup>145</sup> (4) divi-

<sup>136</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>137</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>138</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>139</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.

<sup>140</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 24, Cong. Staffer, in Wash., D.C. (“Their focus . . . [is on] making sure that we stay on-message, are developing whatever that message may be, and push that message forward.”); Interview with No. 15, Cong. Staffer, in Wash., D.C. (“Communications people . . . know how to spin that [legislative information].”).

<sup>141</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>142</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.

<sup>143</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C. (suggesting that every communications office now has a separate position of digital director).

<sup>144</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

sion by task;<sup>146</sup> and (5) division by region.<sup>147</sup> Even when afforded the opportunity to specialize, therefore, Member communications staffs do not elect to divide work portfolios by policy area.

### 3. *Policy Expertise*

Member communications staff possess less policy expertise than do their peers on legislative staffs. Sixteen interviewees mentioned the issue of policy expertise in the context of Member communications staff; of these, all sixteen advanced the claim that Member communications staff bring a lower level of policy expertise than do Member legislative staffs. As one interviewee put it in response to a question about why the former might not draft certain types of statements: “In the personal office [communications departments], I just don’t think that expertise is there for them to be able to do it.”<sup>148</sup>

This lack of policy expertise is partly attributable, once again, to the concomitant lack of policy-area specialization. Remarking on this connection, interviewees commented:

- “Communications staff are doing everything. They’re seeing all kinds of things. And they’re learning just enough to be able to explain it to the outside world.”<sup>149</sup>
- “They know a good bit about the policy, but not the details—as you’d expect, [given that they’re working] across all the issue areas.”<sup>150</sup>
- “A personal office [communications staffer] that has to do every single issue that we may vote on at any point during the year or Congress—they don’t have the ability to go too deep.”<sup>151</sup>

The lack of policy expertise among Member communications staff also is attributable to hiring and staffing practices. Rather than hire individuals with backgrounds in policy work, many Member offices hire communications staffers who bring backgrounds in journalism or public relations.<sup>152</sup> Member offices also will hire communications staffers with experience doing media work on campaigns—a hiring practice that, according to one interviewee, means that: “Usually, around cycle, you’ll see all of them cycle

<sup>145</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.

<sup>146</sup> Interview with No. 10, Cong. Staffer, in Wash., D.C.

<sup>147</sup> *Id.*

<sup>148</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.

<sup>149</sup> Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>150</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.

<sup>151</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 6, Cong. Staffer, in Wash., D.C. (applying the “mile-wide, foot-deep” description to communications staffers, relative to their legislative peers); Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>152</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.

off the Hill and go off to campaigns, and then cycle back on.”<sup>153</sup> Other Member offices believe that it makes sense either to hire without regard to prior experience, particularly for lower-level communications positions,<sup>154</sup> or to view prior work in a congressional communications department as the only relevant experience.<sup>155</sup> In any case, the result is that: “Generally speaking, ‘comms’ staff don’t come from the policy background that the legislative staff has.”<sup>156</sup>

#### 4. Knowledge of Bill

Member communications staff do not personally develop individual bills, nor do they review the text of these bills. As Part III.A explained, this was a widely-shared assumption among interviewees. Moreover, among the small number of interviewees who did explicitly draw comparisons of the knowledge of bills across staffer types, it was unanimous that Member communications staffers had less knowledge of, and exposure to, individual bills than did their congressional peers. With respect to bill drafting, for example, an interviewee noted: “The ‘comms’ staff have no role in drafting legislation.”<sup>157</sup> Instead, interviewees explained, Member communications staff are wholly reliant upon Member legislative staff for their knowledge of bill contents.<sup>158</sup> As a result, their knowledge of bills is more superficial than that of Member legislative staff.

#### 5. Intended Audience

Member communications staff are focused upon reaching an audience of generalist voters—in particular, those who reside in the Member’s home state or district.<sup>159</sup> As explained above, this also includes a focus on the me-

<sup>153</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>154</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.

<sup>155</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 27, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>156</sup> Interview with No. 27, Cong. Staffer, in Wash., D.C.

<sup>157</sup> Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>158</sup> *See, e.g.*, Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>159</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; *see also supra* notes 112–21 and accompanying text.



dia outlets that act as intermediaries between the Member and those generalist voters.<sup>160</sup>

The targeting of constituents as an intended audience—and of the media outlets that reach them—has important implications for the reliability of the resulting congressional statements. It provides a reason to believe that statements drafted by Member communications staff are, all else equal, less faithful to the underlying legal texts they are describing than are statements drafted by staffers who target legal audiences. This conclusion is based on two elements that, according to interviewees, are integral to the way that statements are tailored to constituents in Congress.

First, it is assumed that constituents lack either the capacity, or else the attention span, to absorb many technical details. In exchange for brevity and accessibility, therefore, drafters of constituent-targeted statements will sacrifice something else: precision and detail. Fourteen different interviewees mentioned this reduction of precision and detail as part of the process of tailoring statements for constituents. As interviewees put it:

- “You’re sacrificing some details to make it easy to understand.”<sup>161</sup>
- “It’s our job [as Member legislative staffers] to know the technicalities and nuances, and it’s their job [as Member communications staffers] to dumb that down.”<sup>162</sup>

Put differently, it is thought that any statement for a constituent “needs to be in plain English”<sup>163</sup> and “in layman’s terms”<sup>164</sup> as various interviewees put it—and this involves stripping statements of nuance and detail. Unfortunately, an elimination of nuance and detail often is also an elimination of accuracy. For this reason, the re-framing of legislative ideas for constituents is a process that likely reduces the accuracy of the resulting statement.

Second, as interviewees explained, Member communications staffers pursue a particular goal in their communications with constituents: the goal of persuasion. As one interviewee put it: “You’re trying to be persuasive for whoever may be watching.”<sup>165</sup> Fourteen interviewees mentioned this goal as something that congressional staffers seek when communicating with constituents. This differs from the goal that interviewees articulated with respect

<sup>160</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.; *see also supra* notes 122–124 and accompanying text.

<sup>161</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>162</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 16, Cong. Staffer, in Wash., D.C. (“[The Member communications staffer] will tweak [statements] for—usually, to make them less wonky, or make them more easy to understand.”).

<sup>163</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.

<sup>164</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

<sup>165</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 7, Cong. Staffer, in Wash., D.C.

to legal audiences, where they asserted that they were attempting to accurately relay their intent, not to persuade on any specific points.

Why, from an accuracy or reliability standpoint, is this shift to persuasion troubling? In describing the nature of the persuasive rhetoric that staffers insert for constituents, interviewees pointed toward the tactics of persuasion that have developed in the modern media and marketing contexts. These tactics borrow from the types of puffery and persuasion to which modern Americans have become acclimated in the commercial space. Gesturing toward this connection, numerous interviewees analogized their media-targeted and constituent-targeted rhetoric to the rhetoric of advertising and commercial sales.<sup>166</sup> As students of commercial transactions have long realized, these “puffery” tactics are prone to exaggeration. The use of these tactics in constituent-targeted communications, therefore, is a second element that regularly decreases the accuracy of these particular communications.

Indeed, several interviewees described a somewhat troubling dynamic within Member offices—one wherein Member legislative staff are required to fight for the accuracy of statements against the competing efforts at accessibility and persuasiveness by Member communications staff. As one interviewee remarked:

There are many times spats between our [legislative] office and our press office. They’ll put something in, and we’re like, ‘No, you can’t say that, that’s not technically accurate.’ And then they’ll come back and say, ‘Well so what?’ And we’re like, “Nope,” and we’ll cross it out. And then we’ll have to go through several rounds of iterations on a press release because we as policymakers get really offended by—I hate inaccuracies. And they’re trying to say [a bill helps a population that it doesn’t help]. And it’s just like, ‘No, this bill has nothing to do with [that population or program]. Strike that word.’ So it’s those kinds of things—‘Well no, that’s not accurate,’ and then we’ll have a conversation, go back and forth, they become much more accurate, so they are much more reflective of the intent of the bill.<sup>167</sup>

Interviewees contended that, when this contentious staffer dialogue operates properly, it can generate Member statements that contain the best of

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<sup>166</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>167</sup> Interview with No. 19., Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 23, Cong. Staffer, in Wash., D.C. (“Communications staff are always rolling their eyes [at Member legislative staff,] and are like, ‘They don’t even talk in English. Nobody knows what they’re saying, and no one cares.’ And policy staff are always like, ‘You really cannot say that. You can’t say that. It’s not even a little bit true. It’s not even a little bit true, and you can’t say it.’ And they’re like, ‘But it is! These two things are the same thing.’ And you’re like, ‘These two things aren’t the same thing.’ So, there is this fundamental [divide].”).

both worlds—which is to say, that are both persuasive and accurate. Nonetheless, these hypothetical staffer dialogues underscore the ways in which Member communications staffers, due to their focus on constituent persuasion, inject a voice into congressional decisions that does not prioritize accuracy. In so doing, these dialogues paint a troubling picture of the impact that Member communications staffers may have on the legal precision and accuracy of congressional statements.

To this end, staff within Congress will view the accuracy of a statement as tied, in significant part, to the level of participation that communications staff has in its drafting. This was underscored by one interviewee who suggested that even a press release from a committee will be more accurate than a floor statement from an off-committee Member of Congress.<sup>168</sup> Explaining the reason for this assessment, the interviewee remarked:

I can definitively say that the accuracy of what we put out is higher and truer to the intent of a bill than it would be in a personal office. [I say this because] my understanding, at least anecdotally . . . is their press team will more often roll them, than the other way around. On our committee, it's not like that.<sup>169</sup>

Under this account, once again, the robust involvement of communications staff is linked to a corresponding decrease in the accuracy of a document or statement.

#### IV. DRAFTING ASSIGNMENTS FOR LEGISLATIVE HISTORY

In the interviews for this Article, interviewees also were asked: which type of staffer is assigned to draft each type of legislative history? In response, interviewees described a universe of drafting assignments that is depicted in Figure 3, below.

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<sup>168</sup> Interview with No. 19, Cong. Staffer, in Wash., D.C.

<sup>169</sup> *Id.*

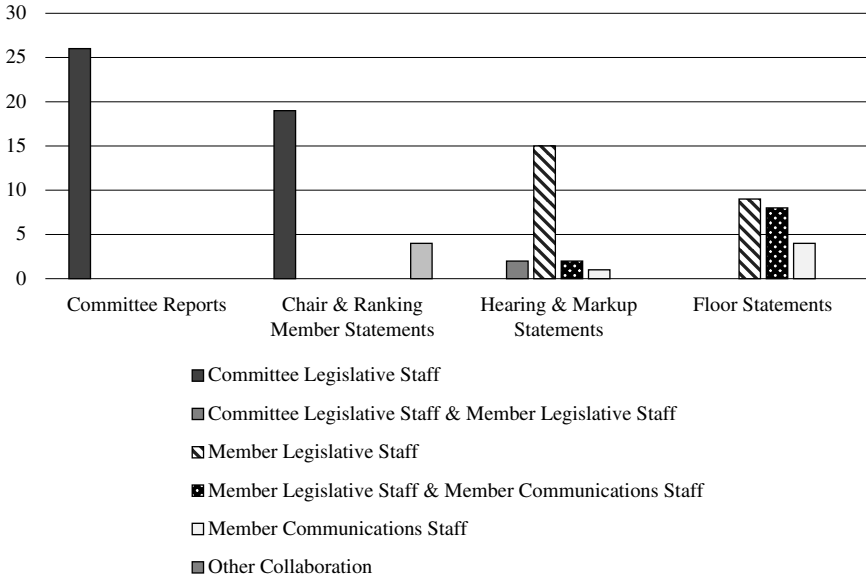
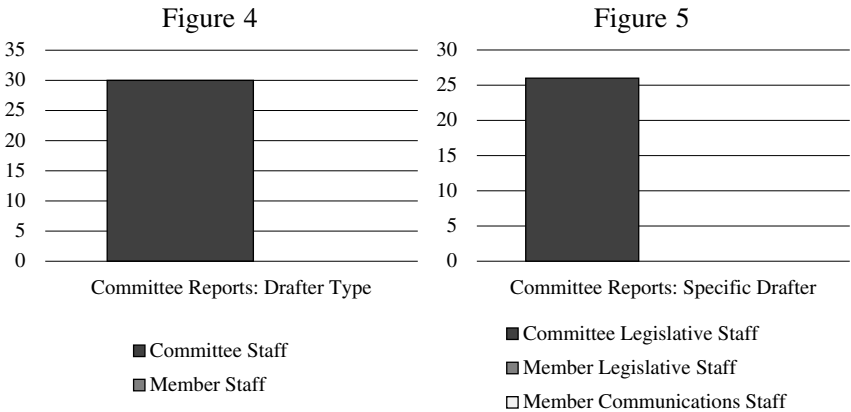


Figure 3. Drafters Overview.

The remainder of this Part will be devoted to discussing the details of the data captured in Figure 3. To this end, each Subpart will begin with additional Figures that highlight a particular subset of Figure 3, and that add detail to it.

A. Committee Reports



Figures 4 & 5. Committee Report Drafters.

Figure 4 shows that, according to interviewees, committee reports are the purview of committee staff. Member staff generally do not have any

involvement in the drafting of these reports—an assessment that all thirty interviewees corroborated. As one interviewee said in a representative remark: “I can’t think of an instance where a Member’s office staff has done a committee report.”<sup>170</sup> Another added: “The [Member’s] personal staff don’t have any real role. And the personal staff of a Member . . . who may be the sponsor of a bill have no real role.”<sup>171</sup>

Meanwhile, Figure 5 reveals that—within the committee—it is the committee legislative staff that takes responsibility for drafting these reports (in association with committee counsels, who similarly can be considered committee legislative staff).<sup>172</sup> Twenty-six interviewees corroborated this assessment, while none contradicted it. As one interviewee put it: “It is usually the lead staffer who was on that policy [who] writes the summaries up and things like that and is responsible for compiling all the various pieces.”<sup>173</sup>

The committee legislative staffer who drafts the committee report is, in typical cases, the same staffer who developed the underlying bill. Thirteen interviewees mentioned this element of the drafting assignment. As one interviewee put it:

The people . . . I knew of drafting committee reports had either worked very closely with Leg Counsel [i.e., the Office of the Legislative Counsel, which drafts bill text], or had sent a first draft to Leg Counsel. I don’t know of anybody who took a first pen on a committee report who was given the task fairly cold. It was usually either one of the negotiators or one of the drafters who took the first pen on that. Now, lots of other people might be engaged to give review and feedback. But they were pretty tightly connected.<sup>174</sup>

This description of drafting assignments assumes, of course, that bills are being developed (or at least significantly refined) at the committee level, as opposed to the Member-office level. This will not be true in all cases, although interviewees provided some reason to think that it is true more often than prevailing thought might suggest.<sup>175</sup> Describing the perceived link between these two activities (viz., report writing and development of the underlying bill), one staffer mentioned that: “The public documents [are

<sup>170</sup> Interview with No. 4, Cong. Staffer, in Wash., D.C.

<sup>171</sup> Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>172</sup> See, e.g., Interview with No. 29, Cong. Staffer, in Wash., D.C. (explaining that “counsel” was simply a way to acknowledge a staffer’s law degree, not a marker of a distinct role).

<sup>173</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>174</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

<sup>175</sup> See, e.g., Interview with No. 22, Cong. Staffer, in Wash., D.C. (explaining that committee staffs sometimes will develop bills and then distribute them to Member offices); Interview with No. 15, Cong. Staffer, in Wash., D.C. (estimating that more bills moving forward in the legislative process are committee-initiated than Member-initiated).

viewed as] an adjunct to legislation,” and so it makes sense to have the same institutional actor handle them both.<sup>176</sup>

As interviewees did note, there are a few caveats to this drafting assignment. First, a few portions of committee reports are drafted by, or with heavy assistance from, the nonpartisan offices within Congress. In the House, the Office of the Legislative Counsel will prepare the “Changes in Existing Law” provision of the report, for example.<sup>177</sup> The Congressional Budget Office will prepare the provision titled “Cost Estimate Prepared by the Congressional Budget Office,” of course.<sup>178</sup> And the Congressional Research Service will provide materials, such as descriptions of current law, that committee legislative staffers may use when drafting the various background, summary, and explanation provisions of committee reports—or that these staffers may even insert directly into reports.<sup>179</sup> Also, if an individual Member inserts an additional view into the report in his or her own name, the personal staff of the Member may handle the drafting of that provision.<sup>180</sup>

Notwithstanding these contributions, however, committee reports are noteworthy for the extent to which they are considered the sole purview of committee legislative staff. As Parts IV.B through IV.D will explain, while most types of legislative history are assigned to a lead drafter, they nonetheless tend to be collaborative products. By contrast, nine different interviewees underscored that the committee report is generated solely by committee legislative staff. As one committee legislative staffer put it: “[The committee reports are] wholly within our responsibility.”<sup>181</sup> Underscoring the significance of this fact, an interviewee referred to it as marking the “fundamental difference” between committee reports and statements by a committee chair or ranking Member.<sup>182</sup>

Interviewees also explained the process by which committee legislative staff draft these reports. When drafting them, interviewees said, they often will draw upon summary documents for a bill that are prepared by committee staff earlier in the committee process.<sup>183</sup> The most notable such document

<sup>176</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>177</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C. On the Senate side, committees may be expected to develop this provision internally. This section is known within Congress as the “Ramseyer report.” See DESCHLER’S PRECEDENTS, H.R. REP. NO. 94-661, at 3144 (1994).

<sup>178</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>179</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 21, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>180</sup> Interview with No. 25, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 2, Cong. Staffer, in Wash., D.C. (identifying isolated instances in which staff of a particularly involved Member may contribute advice).

<sup>181</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>182</sup> Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>183</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 21, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.

is the hearing memorandum.<sup>184</sup> To the extent that it is publicly available, therefore, statutory interpreters may want to consider reviewing hearing memoranda, since committee legislative staffers themselves view these as useful summaries. These memoranda may exist only for bills that proceed through the traditional committee development process, however.

Once the various pieces of the committee report are drafted, those pieces will be compiled and assembled into a formatted report (typically in accordance with a committee-held template).<sup>185</sup> This assembling work can be performed by a committee clerk, a committee parliamentarian, the committee legislative staffer tasked with drafting the report, or the committee counsel.<sup>186</sup> The report then is subjected to at least one level of review, wherein it is reviewed by a superior on committee staff—typically, by a staff director or a chief counsel (or both).<sup>187</sup>

In addition to this review by majority staff, committee reports also regularly undergo a second (and particularly noteworthy) type of review prior to publication: namely, review by committee legislative staff for the minority party. Fifteen interviewees mentioned that committee reports undergo this particular form of minority-party review. Interviewees suggested that this is a uniform practice when the report is bipartisan (i.e., when the minority party does not file separate dissenting views), and even when the report is partisan but the underlying issue was not politically divisive. Interviewees offered contrasting assessments on whether this practice was followed even with regard to partisan reports on politically divisive bills; on some committees, however, it plainly is followed even in this situation.<sup>188</sup> In the case that minority views are filed, moreover, the same process might occur in reverse; the majority is given the opportunity to review the report in advance of filing or publication, thereby allowing Members the chance to file additional views that rebut any inaccuracies discovered in the minority views.<sup>189</sup> In fact, some

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<sup>184</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 21, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>185</sup> See, e.g., Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>186</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 12, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 17, Cong. Staffer, in Wash., D.C.

<sup>187</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 17, Cong. Staffer, in Wash., D.C.; Interview with No. 21, Cong. Staffer, in Wash., D.C.; Interview with No. 25, Cong. Staffer, in Wash., D.C.; Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>188</sup> Compare Interview with No. 4, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C. (asserting that it is uniformly followed) with Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C. (asserting that it may not be uniformly followed, at least for some report provisions).

<sup>189</sup> See, e.g., Interview with No. 13, Cong. Staffer, in Wash., D.C.

committees have entrenched this practice of opposing-party review by writing it into their committee rules.<sup>190</sup>

Part VI will discuss the importance of this opposing-party review practice in further detail. Nonetheless, it is worth briefly noting its significance. Much of the scholarly debate over committee reports has centered around the concern that, because committee reports may not be reviewed by Members of Congress, these reports therefore might present a dangerous opportunity for unprincipled congressional staffers, acting outside of any external review, to insert misleading material into reports.<sup>191</sup> As the opposing-party review practice reveals, however, a lack of Member review does not mean that no effective mechanisms exist to ensure that staffers generate accurate committee reports. Instead, it reveals, committees have adopted an alternative mechanism that serves this function. And, indeed, interviewees did note that they view opposing-party review as serving the function of promoting accountability and accuracy. Explaining the nature of this review, for example, one interviewee noted: “You’re just reading it to make sure they’re not editorializing too much, or [inserting] something that you disagree with.”<sup>192</sup> Similarly, when asked what (if anything) prevents nefarious insertion of material by staffers, an interviewee responded: “I think the bipartisan review is really helpful.”<sup>193</sup> Another remarked: “There’s always the minority—the other side is a check.”<sup>194</sup>

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<sup>190</sup> See, e.g., U.S. SENATE COMM. ON AGRIC., NUTRITION, & FORESTRY, COMMITTEE RULES: RULES OF THE COMMITTEE ON AGRICULTURE, NUTRITION, & FORESTRY, Rule 2.3 (“An appropriate opportunity shall be given the Minority to examine the proposed text of committee reports prior to their filing or publication. In the event there are supplemental, minority, or additional views, an appropriate opportunity shall be given the Majority to examine the proposed text prior to filing or publication.”), <http://www.agriculture.senate.gov/about/committee-rules> [<https://perma.cc/KS6C-TAT5>]; U.S. SENATE COMM. ON HEALTH, EDUCATION, LABOR, & PENSIONS, 111TH CONG., RULES OF PROCEDURE OF THE S. COMM. ON HEALTH, EDUCATION, LABOR, & PENSIONS (Comm. Print 2010) (“An appropriate opportunity shall be given the minority to examine the proposed text of committee reports prior to their filing or publication. In the event there are supplemental, minority, or additional views, an appropriate opportunity shall be given the majority to examine the proposed text prior to filing or publication.”).

<sup>191</sup> For this scholarship, see *infra* Part VI.B.2.

<sup>192</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>193</sup> Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>194</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.



*B. All Statements by Chair or Ranking Member*

Figure 6

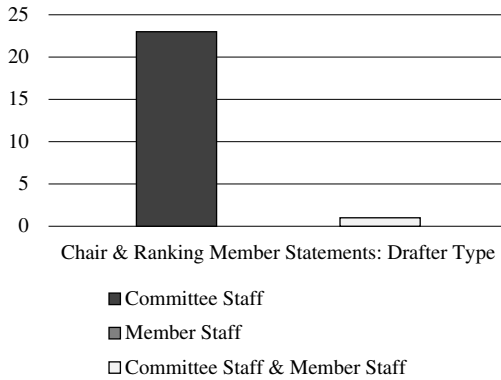
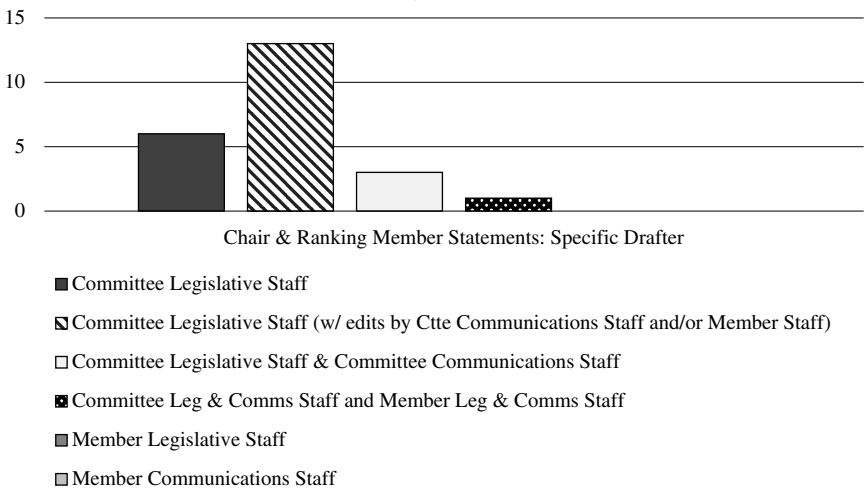


Figure 7



*Figures 6 & 7. Chair & Ranking Member Statement Drafters.*

Drafting assignments for Member statements are divided along an axis that is not reflected in current scholarship. According to this division, statements are handled differently—i.e., are drafted by different staff—when they both: (1) are to be spoken by the Chair or Ranking Member of a committee or subcommittee, and (2) address a topic within the jurisdiction of that committee or subcommittee. This is true, interviewees explained, regardless of whether the statement is to be issued in a hearing, in a markup, or on the chamber floor. In each instance, the statement is produced by the same set of distinctive actors.

As Figure 6 reveals, these Chair or Ranking Member statements typically are drafted by committee staff, not by Member staff. When asked to identify the actors who draft these statements, twenty-three interviewees pointed to committee staff; by contrast, only one interviewee suggested that these statements are co-drafted by committee staff and Member staff, while zero interviewees claimed that these statements are generated solely by Member staff. These results illustrate that, while Member staff may periodically be consulted about the content of these statements, the statements typically are the work product of committee staff.

As Figure 7 then illustrates, interviewees were unambiguous about the involvement, specifically, of committee legislative staff in the drafting process for these statements. Interviewee answers varied, meanwhile, regarding which additional actors may also contribute input. Six interviewees asserted that committee legislative staff have sole responsibility for drafting these statements; meanwhile, thirteen interviewees said that committee legislative staff drafts these statements, but with edits from other staffs (which could consist of Member legislative staffs, Member communications staffs—or, an actor not yet discussed, the committee communications staffs). Three interviewees also contended that committee legislative staffs and committee communications staffs draft these statements collaboratively, and one interviewee said that all aforementioned staffs will draft the statements collaboratively.

Interviewees typically described a situation, therefore, in which committee legislative staff would draft an initial statement, and in which the other relevant actors would review and edit it. In a representative statement, one interviewee said:

We have an approval process. The professional staffer who handles the issue takes the first cut at the opening statement, and then it moves through our subcommittee—and that’s typically just getting refined, it’s nothing significant . . . and then it goes to our senior staff—and our senior staff includes the communications team, and our staff director, and our counsel has to see it—it’s seeing a lot of eyes. Once that gets approved, it goes to the personal office of the chairman, because they need to make sure there’s nothing in there that could be politically dangerous for his local politics. Again, nine times out of ten, that’s coming back untouched from the personal office. But there are things that we don’t understand about the local politics that sometimes we’ll go back and forth on. . . . So, it’s much more of a policy metric until it reaches the personal office, and then there’s a political component, and then it comes back to us.<sup>195</sup>

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<sup>195</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 8, Cong. Staffer, in Wash., D.C. (“The floor statements [for the Chair or Ranking Member] would often be, as a first draft, done by the person closest to [the bill and the issue], but then

While not uniform, descriptions of this sort of collaboration—where committee legislative staff take primary drafting responsibility—were prevailing.

The resulting picture is one in which committee legislative staff drive the drafting process for Chair and Ranking Member statements—but in which these actors, when drafting these statements, are collaborating somewhat with various other congressional staffers. This collaborative element distinguishes these statements from committee reports, which (as discussed above) are the sole purview of committee staff. As one interviewee put it: “[The] big difference is that, [when drafting Chair or Ranking Member statements], we also have to get involved with the personal office staffs.”<sup>196</sup>

Interviewees also suggested that, typically, the committee legislative staffer assigned to draft the Chair or Ranking Member statements was the same staffer who developed the underlying bill. Unlike with committee reports, however, they suggested that there occasionally would be some deviation from this typical assignment process.<sup>197</sup>

While committee communications staffs are not significant drafters of legislative history, and therefore did not warrant separate treatment in this Article, their brief appearance here warrants comment. According to interviewees, these actors strongly resemble the Member communications staffers—their job description, in the words of one interviewee, is that: “They have to help the Chairman sell what we’re putting forth.”<sup>198</sup> In comparison, however, the committee communications staffer is more specialized than is the Member communications staffer (because working on a committee with narrowed jurisdiction), and may consequently possess slightly more policy expertise.<sup>199</sup>

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circulated amongst upper staff, leadership, and ‘comms’ for feedback. And they would flag different issues. So, they would be involved.”)

<sup>196</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>197</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 17, Cong. Staffer, in Wash., D.C.; Interview with No. 27, Cong. Staffer, in Wash., D.C.; Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>198</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>199</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.

C. Other Hearing and Markup Statements

Figure 8

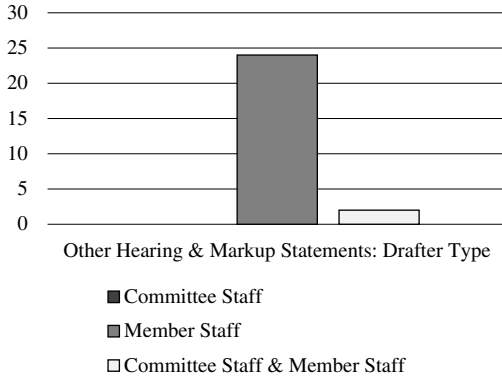
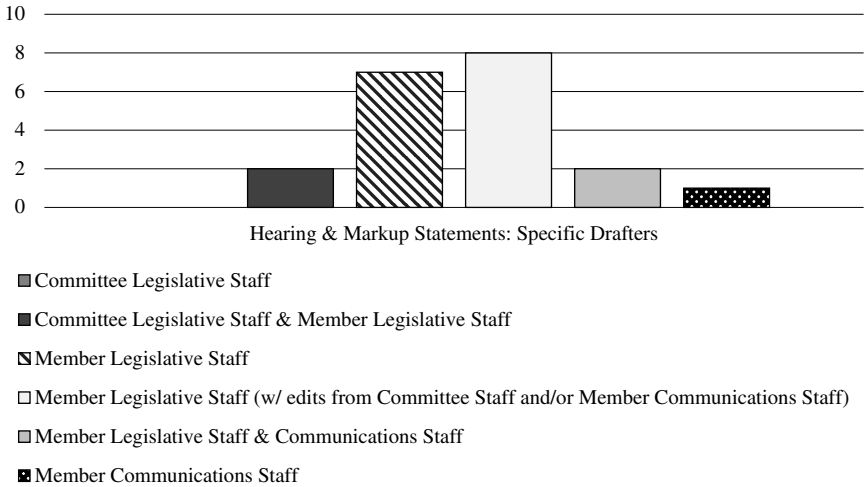


Figure 9



Figures 8 & 9. Other Hearing & Markup Statement Drafters.

When a hearing or markup statement will be issued by a Member of Congress other than a relevant Chair or Ranking Member, as Figure 8 shows, it is generated by Member staff, not by committee staff. Twenty-four interviewees asserted that drafting responsibility for these statements belongs solely to Member staff, while only two interviewees suggested that Member office staff and committee staff regularly collaborate on such statements, and zero interviewees asserted that committee staff alone handles these statements. As one interviewee explained: “If the Member is not the

ranker or not the chairman, then usually their personal office staff write the statement.”<sup>200</sup>

Interviewees did offer three minor caveats on this point. First, they noted that committee staff often will develop a “bank” of questions for hearings, or a similar “bank” of talking points for some markups, that Member staff may draw upon for assistance.<sup>201</sup> Second, if Member staff specifically requests assistance in the drafting process, committee staff may provide that assistance, time permitting.<sup>202</sup> Third, committee staff may review Member statements or questions to prevent redundancy across Members.<sup>203</sup> Interviewees did not view these practices as significant, however, as Figure 8 shows.

Within the Member office, meanwhile, Member legislative staff take a primary drafting role for hearing and markup statements, either alone or with edits from other staffs. Specifically, seven interviewees mentioned only Member legislative staff as the drafters of these statements, while eight interviewees similarly identified Member legislative staff as the drafters but noted that other staffs took an editing role, and two interviewees pointed toward both Member legislative staff and Member communications staff as collaborative partners in the drafting of these statements. Meanwhile, only one interviewee identified Member communications staff as the sole drafter of these statements. As an interviewee said in a typical response:

- “Their [Member legislative] staffer who handles the committee will take the first cut, and then their press team, communications director will take a look. . . . [Then these initial drafters] probably have to go through their Legislative Director, then their Chief of Staff, and then the Member probably.”<sup>204</sup>
- “The ‘leg’ staffers are the ones who do most of the drafting. . . . What [Member communications staff] will tweak is style, and voice, and tenor, and things like that.”<sup>205</sup>

Interviewees additionally gave mixed responses regarding whether, when Member staff had developed a bill (as opposed to committee staff), the

<sup>200</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>201</sup> *Id.*; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>202</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>203</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.

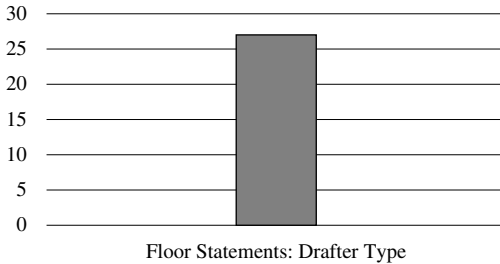
<sup>204</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>205</sup> Interview with No. 27, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 3, Cong. Staffer, in Wash., D.C. (“Typically, it’s policy [staff] first, communications [staff] second, chief of staff or principal [reviewing] third . . . and then back down the chain.”).

Member legislative staffer assigned to draft the hearing or markup statement would be the same staffer who developed the underlying bill. Five interviewees affirmed that it likely would be the same individual, whereas two interviewees suggested that it was not a high priority to align these two drafting assignments.

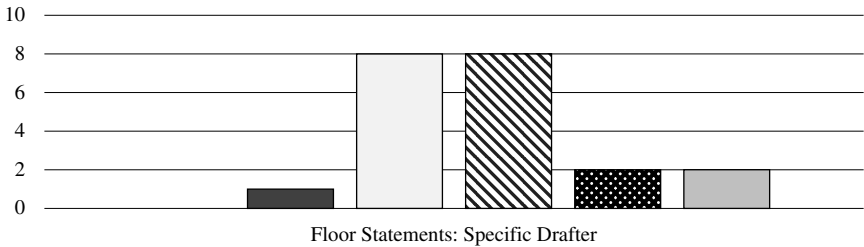
D. Other Floor Statements

Figure 10



- Committee Staff
- Member Staff
- Committee Staff & Member Staff

Figure 11



- Committee Legislative Staff
- Member Legislative Staff
- Member Legislative Staff (w/ edits by Member Communications Staff)
- ▨ Member Legislative Staff & Member Communications Staff
- Member Communications Staff (w/ edits from Member Legislative Staff)
- Member Communications Staff

Figures 10 & 11. Other Floor Statement Drafters.

Floor statements for a bill, when not for a Chair or Ranking Member discussed in Part IV.B, are produced by Member office staff. As Figure 10 illustrates, committee staff typically are not involved in the drafting of these statements. To this end, twenty-seven interviewees asserted that Member office staff generate these floor statements, while zero interviewees asserted

that committee staff draft these statements (whether alone or in collaboration with Member staff). In the words of one interviewee, floor statements are “entirely personal staff.”<sup>206</sup>

Interviewees did identify two caveats to this claim—caveats already discussed in the context of hearings and markups. First, committee staff sometimes will develop talking points to distribute to Members on the floor who are seeking additional material for remarks.<sup>207</sup> Second, committee staff sometimes will assist with or review Member statements upon request, time permitting.<sup>208</sup> As Figure 10 shows, however, interviewees nonetheless viewed Member office staff as the drafters of floor statements.

Within the Member office staff, meanwhile, these floor statements typically are the result of a collaboration between Member legislative staff and Member communications staff. As Figure 11 illustrates, eight interviewees posited that floor statements emerge from this collaboration—and eight additional interviewees asserted that, while Member legislative staff drafts the initial version of the statement, Member communications staff then edits or contributes to it. By contrast, only two interviewees said that floor statements are handled simply by Member communications staff, and only one interviewee said that these statements are drafted simply by Member legislative staff. As interviewees put it:

- “Generally, the ‘leg’ staff, in coordination with the communications staff, will want to work on that product, so that it has both pieces to it—both the policy side of it and the messaging side of it.”<sup>209</sup>
- “If it’s on the floor, whoever drafts first, there’s almost always going to be very close involvement between the relevant legislative staffer and the communications department.”<sup>210</sup>

This collaborative element is reminiscent of hearing and markup statements by “down-dais” Members of Congress, which, as Part IV.C explained, also frequently result from a collaboration between Member legislative staff and Member communications staff. However, interviewees underscored that, when this collaboration occurs in the context of a floor statement, Member communications staff takes a more prominent drafting role. Indeed, interviewees explained, Member communications staff sometimes displace Member legislative staff as the primary drafters for floor statements. One interviewee, for example, noted that: “Our hearing remarks

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<sup>206</sup> Interview with No. 10, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>207</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.; *see also supra* note 201 and accompanying text.

<sup>208</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; *see also supra* note 203 and accompanying text.

<sup>209</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.

<sup>210</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

tend to originate with our policy staff, and then our floor remarks tend to originate with our communications staff.”<sup>211</sup> Interviewees were not uniform in suggesting that Member communications staffs originate these statements, as Figure 11 shows. Yet they did suggest that this occurs with greater regularity in the context of floor statements. Moreover, this trend illustrates the broader point that many interviewees underscored in conversation: namely, that Member communications staff share a greater responsibility for floor statements than they do for markup and hearing statements.<sup>212</sup>

Interviewees gave mixed reports on whether the staffer who drafts the floor statement will be the same staffer who develops the underlying bill. Among the interviewees who addressed this point, five again suggested that it might indeed be the same individual, whereas two said that it typically would not be the same individual.

Two trends in drafting assignments, moreover, provide reasons to doubt that these floor statements are drafted by the same staffer who developed the underlying bill. First, Member communications staffs do not develop bills in Congress, and so their increased drafting role inevitably entails a shift of drafting responsibility away from individuals who might have worked to develop the bill. Second, Member office staffs draft statements for the Member of Congress who employs them—not for other Members. Therefore, even if a Member office regularly assigns drafting responsibility for a floor statement to the staffer who developed the underlying bill, that will align bill development and drafting assignment only within the office of the bill sponsor—and only if the bill was developed at the Member level, not the committee level (or leadership level). However, some interviewees suggested that committees remain the locus of bill development—one interviewee even noted that committees regularly will develop bills and distribute them to Members to create the useful illusion of Member productivity.<sup>213</sup> By contrast, committee legislative staff are more likely to be involved with bill development for each bill that moves through their committees. As one interviewee put it: “[If the bill was passed out of committee,] I’ve had my hands on it.”<sup>214</sup> Together, these two observations suggest that these floor statements often are assigned to a staffer who did not develop the underlying bill.<sup>215</sup>

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<sup>211</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>212</sup> *See, e.g.*, Interview with No. 2, Cong. Staffer, in Wash., D.C. (explaining that messaging-oriented Members shift primary drafting responsibility to communications staff); Interview with No. 5, Cong. Staffer, in Wash., D.C. (explaining why the difference in audience leads to a greater role for communications staff); Interview with No. 6, Cong. Staffer, in Wash., D.C. (explaining same).

<sup>213</sup> Interview with No. 22, Cong. Staffer, in Wash., D.C. (on the distribution of committee-developed bills to Members).

<sup>214</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.

<sup>215</sup> The latter observation also applies to hearing and markup statements, of course.



*E. The Scripted Nature of Congressional Statements*

Stepping back from the details of these drafting assignments, they highlight a broader observation about the modern Congress: today, statements by Members typically are scripted in advance. Admittedly, spontaneous utterances by Members are not extinct in Congress; interviewees noted isolated instances in which these still occur.<sup>216</sup> Nonetheless, interviewees emphasized that such moments have become exceedingly rare.

This scripted quality may be particularly surprising with respect to statements made at the committee level, since hearings and markups are presented to the public as efforts at congressional fact-finding. Yet interviewees repeatedly emphasized the statements' scripted nature. As they put it:

- “In my opinion, markups, like hearings, are Kabuki theatre. That’s how most staffers feel about them.”<sup>217</sup>
- “[Markups] are carefully orchestrated and scripted behind the scenes.”<sup>218</sup>
- “When I first came to the Hill, I was a little surprised, I thought, ‘oh, these are often educational things, where Members can learn about a topic.’ And sometimes it certainly is that. But more often than not . . . it’s all—I wouldn’t say tightly scripted, but it’s all very well thought out and planned, at least with a plan that you try to execute.”<sup>219</sup>

In this regard, the interviews for this article chronicle an important change. A century ago, Woodrow Wilson famously remarked that: “Congress in its committee rooms is Congress at work.”<sup>220</sup> Today, by contrast, the scripted nature of markups has created a situation in which, in the words of one interviewee: “Markups . . . [are] not where the real work is done.”<sup>221</sup>

Floor speeches, interviewees noted, similarly are scripted and planned in advance—even in colloquies, which are drafted to create the appearance of a spontaneous exchange. As an interviewee put it: “A colloquy is always scripted. . . . Every letter is negotiated.”<sup>222</sup>

<sup>216</sup> See, e.g., Interview with No. 10, Cong. Staffer, in Wash., D.C.

<sup>217</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>218</sup> Interview with No. 25, Cong. Staffer, in Wash., D.C.

<sup>219</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.; see also Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 12, Cong. Staffer, in Wash., D.C.; Interview with No. 19, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 21, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 28, Cong. Staffer, in Wash., D.C. (“I’ll be honest—we cook our markups. They are scripted.”)

<sup>220</sup> WOODROW WILSON, CONGRESSIONAL GOVERNMENT 79 (15th ed. 1913) (1885).

<sup>221</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>222</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

V. LOGIC OF DRAFTING ASSIGNMENTS: INTENDED AUDIENCE

Why does Congress divide drafting responsibility for legislative history among different institutional actors, as described in Part IV? Returning to the theory of congressional motivations articulated in Part II can help answer this question. According to that theory, Members of Congress are driven by at least two ambitions: (1) implementing policy objectives; and (2) getting reelected. Realizing each ambition requires effective communication with a different intended audience. The first goal—implementing policy objectives—requires effective communication with policy implementers (including courts, agencies, and perhaps even future Congresses). The second ambition, meanwhile, requires persuasive communication with constituents. When crafting a statement, therefore, Members of Congress will ask: what is the likelihood that the statement will reach, and will be persuasive with, each of these audiences? The answer to this question (i.e., the question of who the Member views as a realistic intended audience for a statement) then will drive the drafting assignment for that statement—since Members retain staffs that, in different measure, are expert at communicating with each of these audiences.

To reveal this alignment of drafting assignment with intended audience, interviewees were asked to identify, for each type of legislative history, the intended audience that they were targeting with the communication. In response, interviewees provided the data about intended audiences that is captured in Figure 12, below.

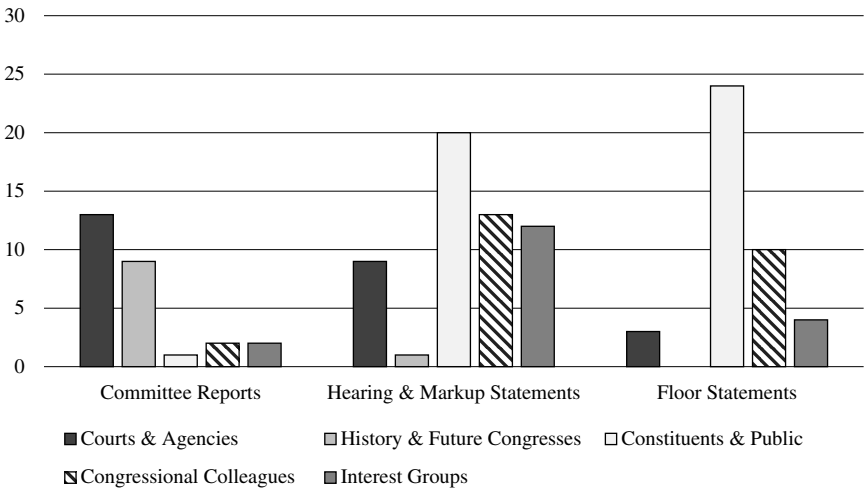


Figure 12. Intended Audiences for Legislative History.

The remainder of this Part will be devoted to discussing the details of the data captured in Figure 12, as well as the information provided by interviewees in follow-up questions.

## A. Committee Reports

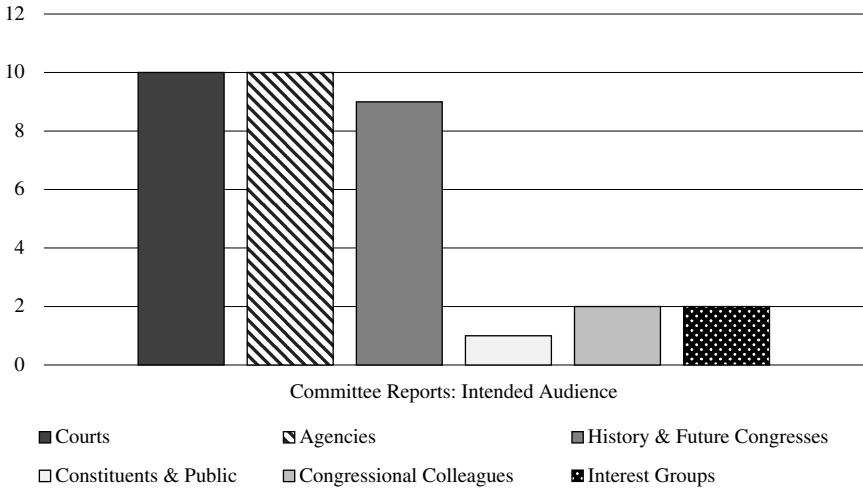


Figure 13. *Intended Audiences for Committee Reports.*

Figure 13 depicts interviewee responses regarding the intended audience for committee reports. As this Figure shows, interviewees pointed to policy implementers as the primary intended audience for these reports. This audience consists of two subsets: the courts (which ten interviewees identified as the intended audience) and executive agencies (which another ten interviewees mentioned). As one interviewee put it: “I think of the committee report as being for people who are actually implementing the law. I want to be sure that I’m clear about what I meant to do.”<sup>223</sup> Another added: “Committee reports seem to be more for the courts or the agencies. So, whoever would be implementing a bill after it was enacted—making sure that the stuff that was behind the negotiated result that would inform the implementer, making sure that that was recorded somewhere.”<sup>224</sup>

A significant number of interviewees also identified another intended audience for committee reports: history and future Congresses. Nine different interviewees mentioned this audience. Speaking to the historical component of this, one interviewee said: “The committee report is for historians. It’s more like a record of why we did what we did.”<sup>225</sup> Similarly, another interviewee added: “The committee report, I view mostly as a historical document that is intended to cover the views of the time of passage, to develop more of a historical document, so that somebody five years from now or ten

<sup>223</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>224</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

<sup>225</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

years from now can say what was happening when people were passing this bill.”<sup>226</sup>

Interestingly, a number of interviewees not only asserted that they write committee reports with future congresses in mind as an intended audience; they said that they also read committee reports in order to gain a better understanding of legislation by past congresses.<sup>227</sup> This usage would seem to suggest that, within Congress, staffers themselves view committee reports as accurate.

Meanwhile, only one interviewee contended that their intended audience for committee reports was the public—and a number of interviewees expressly disclaimed this idea. As one interviewee put it: “Even though [the committee report] is a public document, I assume that normal people will never read it.”<sup>228</sup> Another added: “You know the typical person is not going to read this.”<sup>229</sup>

Why do individuals within Congress view committee reports as poor vehicles for communicating with constituents? First, because a committee report is a written document. To the extent that the public now receives messages directly from Congress, interviewees explained, it does so primarily through internet video clips or through television.<sup>230</sup> In order for a statement by a Member of Congress to reach the public via these vehicles, it must be publicly uttered. Describing the significance, in particular, of the ability of television cameras to capture spoken statements, one interviewee said: “[W]ords you say can eventually be brought before a mass audience [in a modern video era, whether] you plan to have it happen or not. Particularly in the context of a political campaign.”<sup>231</sup>

By contrast, written documents are uniquely poor vehicles for reaching the public. As one interviewee put it: “Something that’s just on paper, unless you get [the facts] wrong—it’s a statement of policy, it’s not going to be something that can really hang you [politically]. Because it doesn’t really go before a broad audience.”<sup>232</sup> Naturally, this changes the sense of audience that staffers will have in mind when drafting these reports. In the words of one staffer: “The paper reports are much more legal in nature, whereas the Members’ statements, it’s more an emotional point, a political point that you’re trying to make.”<sup>233</sup> Consequently, the fact that committee reports are

<sup>226</sup> Interview with No. 4, Cong. Staffer, in Wash., D.C.

<sup>227</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>228</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>229</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 25, Cong. Staffer, in Wash., D.C. (“You wouldn’t just pick up a committee report and read it casually.”)

<sup>230</sup> On the ways that communications departments utilize television and social media, *see supra* Part III.C.2.

<sup>231</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>232</sup> *Id.*

<sup>233</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 25, Cong. Staffer, in Wash., D.C. (“It’s definitely very different [if it is written].”)

written reports has, in a unique way, insulated them from certain public-oriented persuasion tactics.

Incidentally, this idea—namely, that written documents are uniquely poor vehicles for communicating with the public—points toward an important change that has occurred since the Founding. Article I, Section 5 of the Constitution required that proceedings of the chambers of Congress be recorded in a written journal—and, according to conventional wisdom, it required this because written documentation was thought to be the best technology available for the dissemination of information to the public.<sup>234</sup> Today, by contrast, written documentation may be useful for precisely the opposite reason: because it is a uniquely poor method of communicating with this public, it liberates congressional actors to speak directly and precisely to legal implementers.

Interviewees also reported a second reason why committee reports are poor vehicles for reaching the public: namely, because authorship of the reports is attributed to the committee itself (or, at least, to a subset of the committee). This institutional authorship undermines the possibility that the report might be used to promote a specific Member. In the words of one interviewee: “Some language in the report doesn’t have anybody’s name after it,” and this will make it difficult for any individual Member who wants to use the report “to claim credit for something.”<sup>235</sup> Moreover, it also makes “off-message” statements far less damaging for specific Members. As the same interviewee put it: “Having that space [to speak in a written text without personal attribution] frees up the Members. They aren’t prancing for the cameras. They aren’t worried about what some reporter’s going to say or if a potential primary opponent is going to use one of their statements.”<sup>236</sup>

For several reasons, therefore, committee reports are viewed as an ineffective means of reaching the general public—and, consequently, the reports are not targeted at this audience.

The constellation of intended audiences for committee reports helps explain their drafting assignment, which typically is given to committee legislative staffers. As Part III.A explained, committee legislative staffers are focused primarily upon the goal of achieving policy objectives, not of assisting with reelection. Consequently, it makes sense to assign to these staffers drafting responsibility for a statement that, on the one hand, is thought to be essential to the development of a legislative record. As one interviewee put it: “For committee reports . . . in terms of who took first draft, I think [the assignment to committee legislative staff occurred] because they were looking at it from a more legal eye, in terms of building the official legislative record.”<sup>237</sup> Meanwhile, it makes further sense to assign this report to com-

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<sup>234</sup> U.S. CONST. art. I, § 5, cl. 3; *see also* Chafetz, *supra* note 22, at 742.

<sup>235</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>236</sup> *Id.*

<sup>237</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

mittee legislative staff when the report is assumed to escape media and public attention. As the same interviewee put it: “[Communications staff is not involved] because committee reports are never reported on in the press. . . . They’re much more for the implementers.”<sup>238</sup>

B. Hearing and Markup Statements

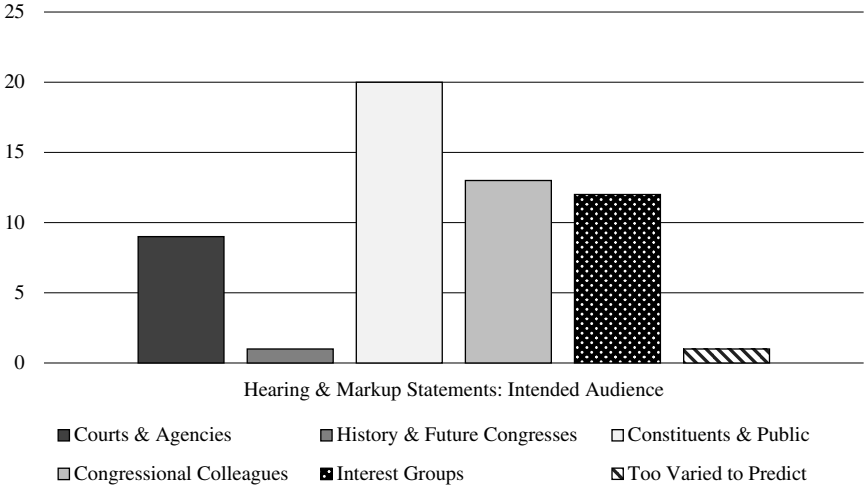


Figure 14. Intended Audiences for Hearing & Markup Statements.

As Figure 14 shows, interviewees gave varied responses when describing the intended audiences for hearing and markup statements. As one interviewee put it: “That’s a little bit more hybrid.”<sup>239</sup> Specifically, a significant number of interviewees identified four different audiences that they target with hearing and markup statements: implementers, constituents, congressional colleagues, and interest groups.

Of these, the greatest number of respondents identified the intended audience of constituents (or, alternately, of the general public). Twenty interviewees mentioned this audience. As one interviewee put it:

I would say generally we write those [statements] with someone back home [in mind], intending for it to get eventually back to our constituents. And generally . . . we will send it to stakeholders at home and say, “[h]ey, wanted to make sure you saw the [Member] spoke on this, the [Member] submitted a statement for this, here’s how [he or she] thinks about it.” Sometimes, especially if it’s a big vote on something that’s controversial, we’ll put the statement on our website or turn it into talking points for our phones,

<sup>238</sup> *Id.*

<sup>239</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.

just so that, if constituents are calling in, we have something that we can say, “[t]he boss feels this way about it, and here’s what [he or she] said.” And that’s on our website. So, we do try to make those things pretty accessible, since we do push them out—typically back home.<sup>240</sup>

Another interviewee added:

For a Member statement at a hearing, or a Member statement at a markup, or a Member statement on the floor, you’re very aware: This is public. And it could be on C-SPAN. So, . . . I would say there’s a strong element of, “I want the American people, whoever may be watching, to know what this is about, and I want them on my side.” So, there’s always—you’re trying to be persuasive for whoever may be watching.<sup>241</sup>

Yet another added: “It’s [usually drafted around the idea that] ‘Member X needs to say Y, so they can then go brag about it at home.’”<sup>242</sup>

Meanwhile, thirteen interviewees said that these statements are intended, at least in part, for congressional colleagues. According to these interviewees, Members making these statements often are “using it as a time to engage [opposite party] Members, because I do think [opposite party] Members are more likely to hear what they’re saying,”<sup>243</sup> and are “trying to use the Member statement to either appeal to the other side, or make the other side feel guilty.”<sup>244</sup>

Twelve interviewees also asserted that these statements are intended for interest groups. As interviewees put it:

- “It’s also how they communicate with folks downtown, various constituency groups.”<sup>245</sup>
- “I think I focus more on industry, because they’re very in tune to when we have committee markups and hearings. I try to make sure that we have always sent the right messages to the right people in industry at our committee markup.”<sup>246</sup>
- “I would say probably [hearing statements are targeting] the community that we’re legislating. It’s more of a warning—‘this is coming.’”<sup>247</sup>

<sup>240</sup> Interview with No. 16, Cong. Staffer, in Wash., D.C.

<sup>241</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

<sup>242</sup> Interview with No. 28, Cong. Staffer, in Wash., D.C.

<sup>243</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.

<sup>244</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

<sup>245</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>246</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.

<sup>247</sup> Interview with No. 19, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 8, Cong. Staffer, in Wash., D.C. (“There are organizations that follow every vote on particular topics, and so we might do markup things to signal something to those groups—or [in] opposition to those groups.”); Interview with No. 22, Cong. Staffer, in Wash., D.C. (“It differs

Nine interviewees, meanwhile, said that these statements are intended for legal implementers. This category, again, includes both executive agencies and courts. For hearing and markup statements, however, those who specified the actor within the legal audience tended to point particularly to agencies. For example, interviewees remarked that:

- “You are then using [those statements] as the basis for agencies—because you’re saying, ‘I disagreed with this all the way along.’ If a Member at a markup is really railing against something, you can guarantee they are going to write you a letter if you’re in the administration, and be calling you, if it actually passes.”<sup>248</sup>
- “A lot of times you know that, if something is controversial, you know that you’ve got to make [certain] points [at the markup] or the agencies are going to dismiss it.”<sup>249</sup>

Hearing and markup statements therefore target a hybrid audience that consists of constituents, congressional colleagues, interest groups, and legal implementers. Interviewees repeatedly described the drafting assignments for these statements as resulting from their attempts to address—and prioritize among—these audiences. As one interviewee said: “[A Member office will] have a different process for statements in hearings versus statements on the floor. And that’s a function of, mostly, what the audience is.”<sup>250</sup> To this end, the interviewee also added:

I would be very surprised if there wasn’t a lot of interplay between “comms” and “leg” on putting together remarks everywhere—because . . . even if you’re in an arcane hearing about some arcane topic, words you say can eventually be brought before a mass audience—whether you plan to have that happen or not. Particularly in the context of a political campaign. . . . So, ultimately, the communications department is going to have to deal with the fallout of that.<sup>251</sup>

Interviewees described a push-and-pull that regularly occurs in the drafting of hearing and markup statements, whereby committee legislative staff argue with Member legislative staff for a greater focus on the audience of legal implementers, versus constituents—and whereby Member legislative staff, in turn, have the same arguments with Member communications

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[from] Member to Member. I think there’s Members who will do it for constituents, there’s Members who will do it for industry.”)

<sup>248</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>249</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.; *see also* Interview with No. 10, Cong. Staffer, in Wash., D.C.

<sup>250</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>251</sup> *Id.*



staff.<sup>252</sup> This is not surprising. It is the result of each staff position performing the job for which it is employed—and the resulting disputes are a natural result of the attempt to generate a statement that simultaneously accomplishes different goals with multiple audiences.

While interviewees offered the foregoing observations about hearing and markup statements generally, they also pointed to a few notable ways in which some markup and hearing statements are distinct from others. First, a number of interviewees mentioned that statements for the Chair or Ranking Member on a committee, while still aimed at these multiple audiences, nonetheless will be somewhat more focused on the audience of legal implementers.<sup>253</sup> As one interviewee put it:

The opening statements and the remarks for the committee proceedings for the Chair[] and the Ranking Members [are] much more technical in nature and less rhetoric, because that is an attempt to assert congressional intent of what is being done. So, if there ever is a question of how an executive agency is executing a law, we can point back to that as congressional intent of what we intended for it to do. . . . [A talking point for a down-dais Members is] more about . . . rhetoric than it is correcting the intent.<sup>254</sup>

The interviewee added: “If there’s an intent question [then] you’re always going to see the Chairman make that correction from the chair.”<sup>255</sup>

A few interviewees also suggested that there might be some difference in intended audience for hearings, as opposed to markups. In the words of one interviewee: “What you say in a hearing is typically driven by your local politics; what you say in a markup is typically driven by congressional intent or it’s that bill’s impact on your local state.”<sup>256</sup>

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<sup>252</sup> Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

<sup>253</sup> On the relationship of audience to reliability, see *infra* Part VI.

<sup>254</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

C. Floor Statements

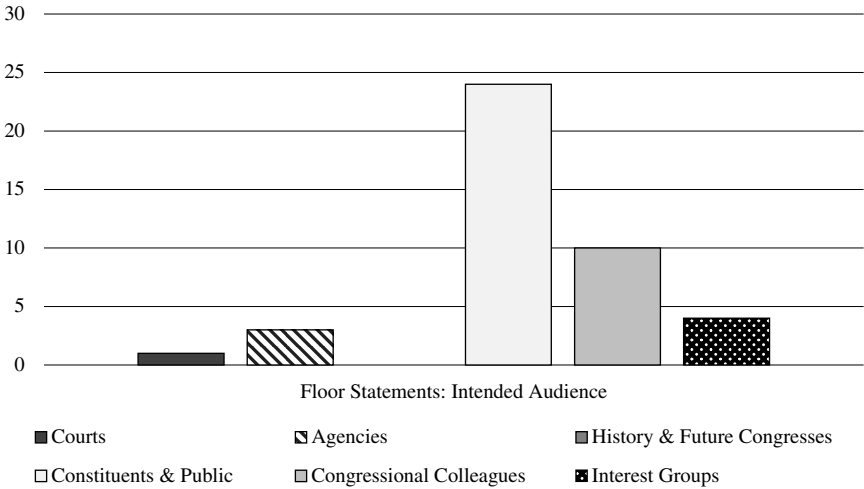


Figure 15. Intended Audiences for Floor Statements.

Interviewees asserted that floor statements are intended, above all, for constituents or the general public. Twenty-four interviewees identified this group as the intended audience of floor statements. As one interviewee put it: “Floor speeches are a chance to speak to constituencies.”<sup>257</sup> This central focus upon constituents distinguishes floor statements even from committee-level statements. As one interviewee explained: “We view floor remarks as being so much more public-facing than something that happens in a hearing.”<sup>258</sup>

In practice, this means that floor statements are drafted not only with constituents in mind, but also with a focus upon the various media outlets that Members will use to communicate their remarks to a broader public. As one interviewee put it: “The floor statement is the starting point for press coverage.”<sup>259</sup>

The focus on media outlets includes efforts to reach, and to make use of, several different types of media. First, it includes making portions of the statement available to traditional media outlets—typically via press statement or press release.<sup>260</sup> Second, it includes the television audience on

<sup>257</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>258</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>259</sup> Interview with No. 2, Cong. Staffer, in Wash., D.C.

<sup>260</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

C-SPAN.<sup>261</sup> Third, it includes audiences reached via the Internet—whether through a website, email, or social media.<sup>262</sup>

The significant extent to which floor statements now are tailored for Internet media—and, in particular, for social media—warrants particular comment. As one interviewee noted: “This is all about the quote you can put out, this is all about the video you can clip and put out as a weekly message.”<sup>263</sup> Another said of floor speeches: “Those are for snippets on Facebook and Twitter.”<sup>264</sup>

Social media sites such as Facebook, Twitter, and Instagram typically host video clips that are extremely short. As a result, floor speeches increasingly are drafted with an eye toward crafting short segments that can be “clipped” and repackaged for these outlets.<sup>265</sup> Similarly, speeches may be reviewed to ensure that there is no snippet that, taken out of context and presented in isolation on social media, sounds impolitic.<sup>266</sup> While video clips on YouTube may be longer than those on social media, the desire to make videos accessible on this site further contributes to this snippet-oriented drafting approach.<sup>267</sup> As a result, the emphasis on addressing floor statements to constituents—and the burgeoning sense that social media is an exceedingly effective way to reach these audiences—seems to be changing the structure and rhetoric of floor speeches. As one interviewee put it:

The rise of digital [media] has forced a lot of people to think in terms of 140 characters—or, now [with the change of Twitter rules], 280 characters. To think in terms of what’s going to be Instagrammable. There are teams of people responsible for ensuring that this content from the [Member] gets out.<sup>268</sup>

Whether through social media or more traditional outlets, however, Members perceive floor speeches as presenting a unique opportunity to reach constituents. As one interviewee summarized it:

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<sup>261</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 22, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>262</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 9, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.; Interview with No. 13, Cong. Staffer, in Wash., D.C.; Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 15, Cong. Staffer, in Wash., D.C.; Interview with No. 16, Cong. Staffer, in Wash., D.C.; Interview with No. 20, Cong. Staffer, in Wash., D.C.; Interview with No. 23, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>263</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.; Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>264</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.

<sup>265</sup> Interview with No. 29, Cong. Staffer, in Wash., D.C.

<sup>266</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>267</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.

<sup>268</sup> Interview with No. 29, Cong. Staffer, in Wash., D.C.

It's not that the public at large is watching every moment of every day what happens on the [chamber] floor. But there's a certain gravity that speaking on the [chamber] floor carries with it. And things that transpire down there can break through . . . to the national consciousness into average people's daily lives. . . . [You can] change the course of our national conversation by speaking on the [chamber] floor.<sup>269</sup>

Few interviewees mentioned other audiences for floor statements. The only alternate audience members were that mentioned with any regularity were congressional colleagues, who were identified as possible audience members by ten interviewees.

Interviewees did note caveats to this, however. In particular, they identified three instances in which floor statements are intended more regularly for legal implementers. First, they noted that colloquies regularly are scripted in the effort to shape legal implementation.<sup>270</sup> Second, they noted that written remarks that are inserted into the record, rather than spoken on the chamber floor, typically are intended for implementers rather than constituents.<sup>271</sup> Third, they reiterated that floor statements by a Chair or Ranking Member on the committee of jurisdiction will be more directed toward legal implementers.<sup>272</sup>

Once again, the intended audience for these statements helps explain their drafting assignment. In particular, the central focus on reaching an audience of constituents explains their assignment to Member offices generally, and the enhanced drafting role of Member communications staff specifically. This linkage—between audience and drafting assignment—was asserted time and again.<sup>273</sup>

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<sup>269</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>270</sup> Interview with No. 10, Cong. Staffer, in Wash., D.C.; Interview with No. 21, Cong. Staffer, in Wash., D.C.

<sup>271</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>272</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.

<sup>273</sup> See, e.g., Interview with No. 5, Cong. Staffer, in Wash., D.C. ("External-facing communications [are] where the communications team tends to come in, usually led by a communications director of some sort."); Interview with No. 8, Cong. Staffer, in Wash., D.C. ("The floor speeches were more forward-facing, and so 'comms' would get an eye to it."); Interview with No. 9, Cong. Staffer, in Wash., D.C. ("The press team will be involved, because you're trying to make a point that you could send out to the press afterwards."); see also Interview with No. 1, Cong. Staffer, in Wash., D.C.; Interview with No. 2, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 7, Cong. Staffer, in Wash., D.C.; Interview with No. 17, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Wash., D.C.; Interview with No. 26, Cong. Staffer, in Wash., D.C.

## VI. IMPLICATIONS

A. *New Hierarchy of Legislative History Materials*

The information reported in the foregoing pages has significant implications for an ongoing debate in the field of legislation: namely, the debate over which types of legislative history courts should trust and prioritize. Since courts want to use legislative documents that are reliable, the key question in this debate has been a question of the comparative reliability of different types of legislative history. Are some types of legislative history, this debate has asked, consistently more reliable than others? If so, which types?

According to the traditional view, some types indeed are more reliable—and the comparative reliability of these different legislative history materials is captured in an oft-repeated hierarchy. Under this hierarchy, legislative materials are presented, in order of decreasing reliability, as follows:

- (1) Committee reports;
- (2) Statements by introducing Members and floor sponsors;
- (3) All other Member statements.<sup>274</sup>

This hierarchy has not gone unchallenged; some scholars have posited alternative hierarchies of legislative materials,<sup>275</sup> while others have rejected entirely the idea that legislative materials can be hierarchically arranged based on their differing reliability.<sup>276</sup> Nonetheless, this hierarchy continues to be cited as the prevailing view on the comparative reliability of different types of legislative history.<sup>277</sup>

The study of Congress offered in the foregoing pages, however, points toward a different hierarchy of legislative history materials. This new hierarchy is grounded upon a commonsense intuition: namely, that the reliability of a communication regularly turns on the institutional actor who generated it.

The modern Congress, the foregoing study shows, is staffed by a range of individuals who have very different job descriptions. These job descriptions provide good reason to think, as a default assumption, that some actors will generate more reliable documents than will others. After all, these actors vary in terms of both their *ability* and their *desire* to report accurately. With respect to *ability*, this is true for two reasons. First, congressional actors differ in their background knowledge of a given policy area. This back-

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<sup>274</sup> See ESKRIDGE ET AL., *supra* note 8, at 981–1021.

<sup>275</sup> See, e.g., Sitaraman, *supra* note 5, at 120–24.

<sup>276</sup> See, e.g., Nourse, *supra* note 5, at 134; see also Vermeule, *supra* note 15, at 1879–80 (noting that intentionalists often feel obligated to move from the hierarchy to more contextual, case-by-case assessments of reliability).

<sup>277</sup> See, e.g., CALEB E. NELSON, STATUTORY INTERPRETATION 362–63 (2011); Nourse, *supra* note 5, at 108; Sitaraman, *supra* note 5, at 120–21.

ground knowledge is relevant to ability to report accurately because, when possessed, it permits specialists to articulate policy nuances and distinctions that elude generalists. This dimension of staffer knowledge was captured in Part III by staff differences with respect to: (1) specialization; and (2) policy expertise. Second, as Part III explained, congressional actors also vary in their knowledge of individual bills—a type of knowledge that is relevant to *ability* to report accurately, since an individual cannot accurately report the contents of a bill without first learning about those contents.

Moreover, congressional staffers also differ with respect to their *desire* to communicate precisely and accurately. This dimension of staffer differences was captured in Part III by interviewee reports of their varying goals with respect to different audiences. On the one hand, some staffers described their intended audience as consisting primarily of legal implementers. With respect to this audience, they asserted, their goal was precise and accurate communication. On the other hand, some staffers described their intended audience as composed primarily of constituents. With respect to this audience, they said, they had a diminished desire to be accurate—a quality reflected in their ambition to remove details and nuances, as well as in their willingness to add “spin” and puffery.

It makes sense to prioritize statements and documents, therefore, when they are drafted by an actor that is superior to his or her peers with respect to each of: (1) specialization; (2) policy expertise; (3) knowledge of individual bills; and (4) intent to address an audience with accuracy and precision. When all four of these factors buttress one another, there is good reason to think that an institutional actor is superior with respect to both *ability* and *desire* to communicate accurately. In such situations, the resulting statements or documents can properly be viewed, as a default, as more reliable.

Conveniently, these four factors do indeed buttress each other with respect to different congressional staffers. They align to suggest that statements will be most reliable when drafted by committee legislative staff (which interviewees ranked highest on each of these dimensions), less reliable when drafted by Member legislative staff (which interviewees ranked lower on each dimension), and even less reliable when drafted by Member communications staff (which staffers ranked lowest on all these reliability-related dimensions).

When combined with the information from Part IV about staffer drafting assignments, this hierarchy of staffer reliability translates into something more useful for courts and scholars: namely, a hierarchy of legislative materials. Under this hierarchy, legislative materials are viewed, in order of decreasing reliability, as follows:

- (1) Committee reports;
- (2) All statements by committee Chairs and Ranking Members on committees or subcommittees of jurisdiction;
- (3) Other markup and hearing statements;

## (4) Other floor statements.

Interpreters, therefore, should consider adopting this new hierarchy when interpreting legislative materials emerging from the modern Congress. It is a hierarchy that, in some cases, challenges prevailing wisdom. This is seen, for example, in its contention that, to the extent that a single Member's statements should be prioritized as especially reliable, that Member should be the committee Chair or Ranking Member, not the introducing Member or floor sponsor. It also challenges the existing hierarchy with its contention that hearing and markup statements are more reliable than floor statements.

In other cases, the new hierarchy confirms prevailing wisdom—but, to accomplish this, it places that wisdom on new foundations. This is seen, for example, in its confirmation that committee reports are particularly reliable. This is the case, the foregoing study observes, not because committee reports are drafted by Members who personally developed the bill in committee, and who therefore have a heightened exposure to the bill and its underlying debates. Instead, it discovers, these reports are especially reliable because, among other things, they: (1) are drafted solely by committee legislative staffers; and (2) are written documents attributed to institutional authors, and thereby are not suited to television or social media.

Additionally, the foregoing pages noted some specific instances in which particular statements or documents will be of heightened reliability, relative to comparable statements of the same type. Statutory interpreters may also want to consider giving these particular forms of legislative history heightened priority. These might include: (1) colloquies; (2) remarks inserted into the record; or (3) certain statements from the Senate, as opposed to the House.<sup>278</sup>

As with the currently-used hierarchy, it should be noted, this new hierarchy of legislative materials should be viewed as the starting point—not the end point—of any examination of legislative history. These hierarchies always remain subject to rebuttal by evidence that, in a specific instance, unique legislative circumstances led a particular document to be more (or less) reliable than usual. These hierarchies simply provide interpreters with a default assumption about reliability, in other words, and the new hierarchy proposed in this Article is no different. With this new hierarchy, however, interpreters can ensure that the default assumption is anchored in the realities of the modern Congress.

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<sup>278</sup> This heightened reliability of colloquies reinforces a finding by Gluck and Bressman. See *Congressional Drafting Part I*, *supra* note 5, at 986.

## B. Textualist Prohibitions on Legislative History

### 1. Accuracy Reviews of Committee Reports

Rather than advocating for any hierarchy of legislative history materials, textualists have argued that courts simply should not utilize legislative history. In support of this argument, textualists have advanced a number of arguments—including one that, in the effort to show that committee reports are unreliable, relies on an observation about the drafting process for these reports. These textualists have drawn attention to the fact that Members of Congress, in many instances, neither read nor write legislative history.<sup>279</sup> By highlighting the fact that Members are not reading or writing this history, textualists have conjured an image of the drafting staffers as troublingly unmoored from the will of Members—and they have suggested, consequently, that documents generated by these staffers are not sufficiently reliable to warrant their use by courts.<sup>280</sup> In this way, textualists have offered an argument that relies on an important assumption: namely, that direct authorship by Members, or direct review by the Members, is the key oversight mechanism in Congress.

In their response to this argument, intentionalists largely have accepted the premise advanced by textualists—and they have advanced an institutional premise of their own. Members of Congress, these intentionalists observe, similarly do not read or write statutory text.<sup>281</sup> The implication, presumably, is that the textualist observation fails to provide a cogent reason for distinguishing between statutes and legislative history. By focusing exclusively upon this rebuttal, however, intentionalists have failed to provide any affirmative reason to believe that committee reports are reliable. Moreover, by adopting the textualist focus upon Member review of documents (and broadening it to other legislative materials beyond committee reports),

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<sup>279</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION 32–35 (1997). See also Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir 1985) (Scalia, J., concurring) (arguing that deference to committee reports created a system of “committee-staff prescription” and quoting an exchange in which Senators confessed they had neither written nor fully read a committee report). For others making this argument, see, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420–21 (2005); Abner J. Mikva, *A Reply to Judge Starr’s Observation*, 1987 DUKE L.J. 380, 384–85; Ray Stringham, *Crystal Gazing: Legislative History in Action*, 47 A.B.A. J. 466, 467 (1961); U.S. DEP’T OF JUSTICE OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY 53–56 (summarizing this argument and noting the various scholars who have advanced it) [hereinafter USING AND MISUSING].

<sup>280</sup> See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment) (“What a heady feeling it must be for a young staffer to know that [his or her citation of obscure district court cases in a committee report] . . . can transform them into the law of the land . . .”).

<sup>281</sup> See, e.g., Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 56 (1999); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 307 (1990).



they have buttressed the textualist assumption that Member review is the relevant oversight mechanism in Congress.

The interviews conducted for this Article, however, reveal broader problems with this debate. According to these interviews, it is true that Members might not provide direct oversight of the production of committee reports.<sup>282</sup> This does not mean, however, that no effective mechanisms exist to ensure that staffers generate accurate legislative history. In fact, interviewees explained, other accountability mechanisms have moved to the fore in Congress. Most notably, interviewees emphasized that opposing-party review provides an important institutional check with respect to committee reports.<sup>283</sup> According to interviewees, the routine practice on many committees is to share the fully drafted committee report with the committee staffers of the opposing party—and to do so prior to filing or publishing this legislative history. This affords the minority an opportunity either to: (1) flag any inaccuracies in the report and insist upon their correction; or (2) in the case that the majority is unwilling to address the inaccuracies, file separate minority views. In the case that minority views are filed, moreover, the same process might occur in reverse; the majority is given the opportunity to review the report in advance of filing or publication, thereby allowing Members the chance to file additional views that rebut any inaccuracies discovered in the minority views. In fact, as Part IV explained, a number of committees have entrenched this practice by writing it into their committee rules.

When viewed in light of this congressional practice, it becomes evident that this entire debate between textualists and intentionalists is misguided. Both sides of this debate have accepted the premise that Member review is the primary mechanism to guard against nefarious staffers inserting misleading statements—an assumption which wholly misses the fact that Congress has developed an alternative mechanism to accomplish this task. In light of this practice, courts should operate under the default assumption that, in situations where interviewees suggested that opposing party review is uniform practice, committee reports have undergone a review for accuracy. These situations include: (1) any situation in which minority views are not filed; (2) situations in which minority views are filed, but the underlying bill was not politically contentious; and (3) situations in which reports are issued by committees that, in their committee rules, require opposing-party review. Meanwhile, more investigation should be done into the extent to which committees perform opposing-party review even beyond this defined set of situations—because, even in these instances, a number of interviewees suggested that opposing-party review does still occur.

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<sup>282</sup> See *supra* Part IV.E.

<sup>283</sup> See *supra* notes 177–179 and accompanying text.

## 2. Audiences and Motivations

Textualists also advance a second argument challenged by the foregoing study. According to these textualists, legislative history often contains strategic, calculated attempts to manipulate the courts.<sup>284</sup> To support this argument, Justice Scalia provides a purported history of the shifting incentives that have weighed upon Congress. At one time, he argues, legislative history was drafted in order “to inform and persuade those who voted.”<sup>285</sup> In such instances, Scalia suggests, the overriding congressional incentive was to produce an accurate statement that would reliably inform internal institutional actors (*viz.*, Members of Congress) about the contents of a bill. However, as courts increasingly came to use legislative history to interpret statutes, Scalia says, a powerful new incentive weighed upon Congress: namely, the incentive to use legislative history as a tool to manipulate courts. As Judge Kozinski puts it when making this same argument, the idea is that: “The propensity of judges to look past the statutory language . . . creates strong incentives for manipulating legislative history.”<sup>286</sup> This incentive, Scalia adds, took over as the dominant incentive in Congress. Consequently, he concludes that: “[A]ffecting the courts rather than informing the Congress has become the primary purpose of the exercise.”<sup>287</sup> The result, he suggests, is that the dominant incentive ceased to be incentive to communicate reliable information to actors within Congress—and, instead, it became incentive to communicate unreliable information to actors outside Congress.

The foregoing study complicates these claims in several ways. First, it adds complexity to the relatively simplistic narrative Scalia offers about the historical evolution of the audience for legislative history. Contrary to Scalia’s suggestion on this front—namely, that Congress now adopts a single-minded focus on courts as the intended audience—this study shows that the modern Congress addresses a variety of audiences through its legislative history: legal implementers, constituents, congressional colleagues, future congresses, and interest groups, among others. Moreover, even when Con-

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<sup>284</sup> SCALIA, *supra* note 279, at 34. See also *Blanchard*, 489 U.S. at 99 (Scalia, J., concurring) (arguing that materials are inserted into legislative history “to influence judicial construction”); *Hirshey*, 777 F.2d at 7–8 (Scalia, J., concurring) (arguing that “routine deference to the detail of committee reports” by courts had led to “the predictable expansion in that detail” by a Congress eager to take advantage of the courts’ use of those reports). For others making this argument, see, for example, *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (en banc) (Kozinski, J., concurring in the judgment) (“The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process.”); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1019 (1992); U.S. DEP’T OF JUSTICE OFFICE OF LEGAL POLICY, *supra* note 279, at 53–55 (summarizing this argument and noting the various scholars who have advanced it).

<sup>285</sup> SCALIA, *supra* note 279, at 34.

<sup>286</sup> *Wallace*, 802 F.2d at 1559 (Kozinski, J., concurring in the judgment).

<sup>287</sup> SCALIA, *supra* note 279, at 34.

gress is targeting legal implementers, the study shows, its Members frequently are thinking primarily of agencies, not courts. The textualist narrative about audience, therefore, suffers from a first infirmity: it oversimplifies the intended audience for legislative history. In so doing, it overlooks the fact that different types of legislative history target different audiences.

Second, this study also challenges the textualist assumptions about the goals that congressional drafters pursue with different audiences. According to the textualist argument, these drafters pursue the goal of accurate description when addressing congressional colleagues, but they pursue a goal of misleading persuasion when addressing courts. By contrast, interviewees for this study contended that they pursue the goal of accurate description when addressing either of these audiences—but that they drift toward simplistic overviews, as well as puffery and persuasion, when addressing constituents.

As previously noted, there is good reason to bring some skepticism to interviewee self-reporting on this front. The nefarious motives suggested by Scalia and Kozinski could only succeed, after all, if congressional staffers persisted in the pretense that they were trying to provide courts with an accurate description of their labors. In this regard, the study offered in the foregoing pages is wholly consistent with the textualist account. Yet interviewees revealed a surprising willingness to confess that, with respect to constituents, their goals were more complex—despite the fact that their communications to constituents, it would seem, rely no less on a perception of accuracy. This candor among interviewees provides some reason to take seriously the idea that the textualist account misapprehends the goals that congressional staffers pursue when they seek to address courts. As such, it also throws into question the textualist assumption that congressional statements aimed at courts should be treated, for that reason, as unreliable.

### C. *Legislative Record Review*

The foregoing study also has implications for a particular form of constitutional review that has emerged recently. Over the past two decades, the Supreme Court has begun to make stringent demands of the legislative record in its reviews of the constitutionality of federal legislation. Beginning perhaps with *Board of Trustees of the University of Alabama v. Garrett*<sup>288</sup> in 2001, the Court has started to insist that, in order for federal legislation to pass constitutional scrutiny, the constitutionally appropriate logic supporting the legislation must be apparent from, and explicit in, the legislative record for that legislation.<sup>289</sup> Under this form of review, rational motives will not be attributed to Congress; rather, those motives must be explicitly documented

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<sup>288</sup> 531 U.S. 356 (2001). On *Garrett* as the emergence of this trend, as well as on the predecessor cases that set the stage for *Garrett*, see William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 136–43, 160–61 (2001).

<sup>289</sup> See *Garrett*, 531 U.S. at 368.

by Congress in its legislative history. A version of this judicial review—which Buzbee and Schapiro have labeled as “legislative record review”<sup>290</sup>—made a particularly noteworthy appearance in *Shelby County v. Holder*,<sup>291</sup> the case from 2013 that overturned a key provision in the Voting Rights Act of 1965.<sup>292</sup>

Implicit in this “legislative record review” is an assumption about the comprehensiveness of the legislative record. After all, the relevant constitutional tests are designed to assess whether necessary factual predicates existed to logically and legally warrant the legislative intervention, and perhaps to assess whether those predicates did indeed trigger the intervention. According to the Court’s logic, if the legislative record does not document a congressional cognizance of certain facts and concerns, then those facts and concerns did not animate the enacting Congress. This logic makes sense only if one assumes that the legislative record by Congress is a comprehensive documentation of the considerations that spurred the enactment of the legislation.

As several scholars have noted, insofar as “legislative record review” assumes the legislative record to be comprehensive, it rests upon a naïve and flawed assumption about the legislative process.<sup>293</sup> A great deal of congressional fact-gathering, informational assessment, and policy development occurs in off-the-record settings. As Bryant and Simeone put it: “Congress properly relies on a wide range of information-gathering methods not reflected in the formal legislative record.”<sup>294</sup>

The present study both updates and reinforces this observation from Bryant and Simeone. It does so, in particular, by revealing the extent to which staffers now view many on-the-record moments essentially as media opportunities, not as chances to compile and assess legislative facts and arguments. As Part IV.E observed, these on-the-record moments are now regularly scripted and viewed in Congress as “Kabuki theatre” performed for constituents and the media, as one interviewee put it.<sup>295</sup> Indeed, interviewees described how even witness testimonies at hearings—which have a heightened appearance of a real-time gathering of facts—are often scripted.<sup>296</sup> According to these descriptions, official congressional fora are not operating as genuine spaces of legislative fact-finding and deliberation. As such, it

<sup>290</sup> Buzbee & Schapiro, *supra* note 288.

<sup>291</sup> 570 U.S. 529 (2013).

<sup>292</sup> *See id.*

<sup>293</sup> *See, e.g.,* Buzbee & Schapiro, *supra* note 288, at 160–61; A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Statutes*, 86 CORNELL L. REV. 328, 369–70 (2001); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 739 (1996); Margaret B. Kwoka, *Setting Congress Up to Fail*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 97, 102 (2015).

<sup>294</sup> Bryant & Simeone, *supra* note 293, at 385.

<sup>295</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>296</sup> Interview with No. 19, Cong. Staffer, in Wash., D.C.

stretches credulity to treat the record compiled in these spaces as a comprehensive documentation of the earnest fact-finding efforts of Congress. Yet this is precisely what courts do when they conduct “legislative record review.” As such, the foregoing study provides a potent reason why this form of review should be abandoned.

#### *D. Rhetorical Duplicity in Congress*

Interviews for this Article revealed that, when addressing the public, Members of Congress sometimes intentionally speak with diminished accuracy. While interviewees never described these public-oriented communications as outright prevarications, their comments nonetheless raise a difficult question: what should statutory interpreters do when Congress attempts to speak out both sides of its mouth? In other words, what is the proper role for courts to play when Congress—through legislative history—tries to instruct implementers that a statute contains one idea, and then also tries to persuade the public that the statute contains another idea? This Article operates out of the supposition that, in this instance, the role of the court is simply to adhere to the implementation-oriented intent of Congress. Yet it is certainly understandable that some might want courts to hold Members accountable for their publicly-directed communications—including by binding interpretation to these communications, even when it is clear that this transgresses congressional intent. Such an approach would need to adopt a more robust vision for the courts in statutory interpretation than the “faithful agency” model that most courts espouse, however—and it would need to overcome recent evidence that efforts by courts to discipline Congress are largely ineffectual.<sup>297</sup> Still, the findings by this study bring this challenging question to the fore.

#### *E. The Role of Communications Staffers*

It does not appear that, prior to this Article, there has been any acknowledgment or discussion in the legal literature of a particular type of congressional staffer: the communications staffer.<sup>298</sup> This silence is surprising. As interviews for this Article revealed, these staffers now play a central role in shaping a dialogue that is central to our democratic system: namely, the ongoing dialogue between Members of Congress and the public. Moreover, it is not immediately obvious that the impact that communications staffers are having upon this dialogue is, from a constitutional standpoint, wholly beneficial. As communications scholar Timothy Cook has noted: “The presence of a press secretary is important . . . because the position integrates

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<sup>297</sup> See generally *Congressional Drafting Part II*, *supra* note 5.

<sup>298</sup> See COOK, *supra* note 21, at 79.

journalistic perspectives into the House office.”<sup>299</sup> Is the rise of “journalistic perspectives” inside congressional offices—and the concomitant rise of impressionistic and spin-oriented tactics—beneficial or harmful to the constitutionally-envisioned project of communicating Member efforts to the general public?<sup>300</sup> The answer to this seems far from certain. As such, while an exploration of these questions was beyond the scope of this Article, it should be an important avenue of further study for legislation scholars.

#### F. *Opposing Party Review of Committee Reports*

Section IV.A discussed an interesting committee-level practice uncovered by the interviews for this Article: partisan committee staff allows their opposing party counterparts to review (and to negotiate for changes to) the report. This practice brings with it a number of important benefits. For the committees, interviewees explained, the practice helps ensure the accuracy of the resulting committee reports, and it also helps promote bipartisanship within Congress by fostering amicable working relationships with opposing party staff.<sup>301</sup> For statutory interpreters, meanwhile, this practice provides the benefit cited in Part VI: it provides added assurance that committee reports are not generated by an unchecked staffer who, in the absence of such institutional mechanisms of accountability, might seize the opportunity to insert misleading information into the report.

To maximize these benefits, committees should consider expanding and formalizing this practice. This might include three reforms. First, it could include the extension of this practice to any situations in which it may not currently be occurring in Congress. Reports were mixed on whether this practice extended even to divisive bills for which minority views were submitted. It would make sense to extend this practice into—and perhaps especially into—these hyper-partisan situations.

Second, more committees could formalize this practice by requiring it in their committee rules. Taking this extra step, even on committees that already informally follow this practice, would have important benefits. First, it would make it more difficult for committees to disregard this practice in specific situations in which they might be tempted to do so. Second, it would provide outside interpreters with a formal, written assurance that the report had been subjected to this accuracy-enhancing review. In other words, it could act as a certain type of warranty to the outside world—one that announces that any particular committee report was subject to this beneficial review. This warranty already exists for some committees, where it simply is being neglected by courts and scholars. Yet it would make sense for more

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<sup>299</sup> See *id.* at 71 (1989).

<sup>300</sup> On the constitutional assumption of this Member-public dialogue, see *supra* note 22.

<sup>301</sup> See, e.g., Interview with No. 25, Cong. Staffer, in Wash., D.C. (citing both of these effects).

committees to offer it, particularly if they already are undertaking this practice anyway, and especially if courts begin to acknowledge its utility to their interpretive endeavor.

Third, committees may want to consider adding a timing component to this practice. One interviewee raised concerns that, while committee reports are shared with the opposing party prior to their publication, the time provided for review before publication may be so short that a detailed, in-depth review becomes difficult.<sup>302</sup> If committee rules specified the amount of time that opposing party staff must be afforded with a report prior to its publication, this situation could be prevented, and the benefits of the opposing party review process could be maximized.

Through these reforms, congressional committees not only could improve their work product, but also could provide courts with valuable assurance of the reliability of committee materials. In so doing, these committees could build upon Congress's own past successes in devising and implementing internal mechanisms to promote accuracy and accountability—successes that, to date, courts and scholars have entirely overlooked.

## VII. CONCLUSION

Over the last four decades, Congress has undergone a profound series of changes. Transformed into a modern bureaucracy, it now bears little resemblance to the institution that existed a half century ago. For statutory interpreters seeking to make sense of the legislative materials that emerge from this modern Congress, a working understanding of the institution—its actors, its rules, and its processes—can prove invaluable. Similarly, this institutional understanding is essential to legislative reform projects—since these projects, in order to improve the institution, first must understand it. By developing this institutional understanding of Congress as it applies to legislative history, this Article hopefully has assisted in both these endeavors—and, in so doing, has highlighted the valuable work that remains yet to be done in the “process-based turn” in legislation scholarship.

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<sup>302</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

